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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1039

LOCAL 300, UNITED INDUSTRIAL WORKERS OF AMERICA, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

MARRIOTT IN-FLITE SERVICES DIVISION OF MARRIOTT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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vs.

MARRIOTT IN-FLITE SERVICES DIVISION OF MARRIOTT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To: *The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.*

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 7, 1969.

OPINIONS BELOW

The opinion of the court below is under the caption *Marriott In-Flite Services, Division of Marriott Corporation* v. *National Labor Relations Board* (and reverse title) reported at ..... F. 2d ..... (5th Cir., 1969), 61 L. C. 10388, and appears in Appendix B below.

The decision and order of the National Labor Relations Board from which the petition for review and cross-petition for enforcement were filed in the court of appeals, is reported at 171 NLRB No. 102 (1968), and appears in Appendix D below.

JURISDICTION

Jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in setting aside the Board election because of the Board's failure to follow uniform election procedures relating to foreign-language ballots, where the varying election procedures grow out of the fact that the Board under its statutory power has delegated to its regional directors the authority to conduct elections.

2. Where the Union received a majority of approximately sixty per cent of the votes in a unit which included both English-speaking and Spanish-speaking employees, did the Court of Appeals err in setting aside the election on the sole ground that the Board's regional director had used English-language ballots, where none of the employees had any difficulty in voting in the election.

STATUTES AND REGULATIONS INVOLVED

The Labor Management Relations Act, 1947, as amended, 61 Stat. 136, 29 U. S. C. § 151 *et seq.*, Sections 3, 9.

Administrative Procedure Act, 5 U. S. C. § 706.

National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, 26 F. R. 3885 § 102.62 and 102.69.

Regional Directors Delegation of Authority, 26 F. R. 3911.

The pertinent sections of the above are printed below in Appendix E.

STATEMENT OF THE CASE

The petitioner, Local 300, United Industrial Workers of America, Seafarers' International Union of North America, AFL-CIO, a labor organization, seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit. The respondent, Marriott In-Flite Services Division of Marriott Corp., an employer, had petitioned the court below pursuant to Section 10(c) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*, for review of the decision and order of the Board finding the respondent in violation of Section 8(a) (1) and (5) of the Act by refusing to bargain with the Union. Although the Company's plants, the employees, and the Board's regional office which was involved in this proceeding were all located in Chicago, Illinois, the court below had jurisdiction under Section 10(e) and (f) of the Act, as the Company is also engaged in business within that judicial circuit.

On February 21, 1966, the petitioner, a labor organization, and the respondent, an employer, entered into a Stipulation providing for a representation election among the Company's employees in Chicago, to be conducted under the supervision of the Thirteenth Region of the Board (R. 3).[1] Before signing the election Stipulation the Employer had requested multilingual ballots and election notices. The Regional Director agreed to furnish Spanish-English notices but denied the request for Spanish-English ballots.

1. References to the printed record in the court below are shown as R. ....; references to the Appendix herein are shown as A .....

The Employer did not insist upon such ballots as a condition of signing the election Stipulation, nor did it ask for a pre-election hearing on this issue. The Stipulation contained a waiver of any hearing prior to the election (R. 5). In advance of the election, the Board's Regional Office furnished Notices of Election which were printed in English and Spanish and reproduced a sample ballot in the form actually used in the election, for posting in the plant (A 1, 2). The Employer raised no objection prior to the election concerning the use of English-language ballots, even though it was aware in advance of the election that such ballots were to be used. The election, conducted on March 18, 1966, resulted in a majority vote of 299 to 203 for the Union (R. 8). No employee complained of any difficulty in understanding or in voting the ballots, which contained simply a choice of "Yes" or "No" (A 1, 2).

The Employer filed post-election objections, including an objection based upon the use of English-language ballots. Following a hearing, the objections were overruled and the Union was certified on June 16, 1967. The Employer refused to bargain. Unfair labor practice proceedings followed. The Board held that the Regional Director had acted within his discretion in furnishing ballots in the English language (R. 247-248). The Board found the Company in violation of Section 8(a)(1) and (5) of the Act and ordered the Company to bargain. The Company petitioned the Court of Appeals for the Fifth Circuit to set aside the Board's order. The Board cross-petitioned for enforcement and the Union intervened. The Court of Appeals denied enforcement of the order, on the sole ground that the ballots were printed only in English.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below conflicts directly with decisions of this Court respecting the authority of the National Labor Relations Board in the conduct of representation elections, and with decisions of this Court limiting the permissible scope of judicial review of administrative agency action. One of the critical functions of the Board in the area of labor-management relations is its conduct of representation elections. The decision below creates a serious impediment to the Board's exercise of its statutory authority in this field. Review of the case by this Court is important in order to eliminate this problem in the administration of the Act.

At the core of the statutory scheme for determining collective bargaining representatives, Congress, in Section 9(B) of the Act, vested in the Board exclusive authority to conduct representation elections. This Court settled early in the history of the Act that it is the function of the Board to determine how to conduct representation elections, for "... Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives ..."; and the Court affirmed the Board's authority to fashion election procedures which are in accord with election practices generally. *N. L. R. B.* v. *A. J. Tower Co.*, 329 U. S. 324, 330-332 (1946).

The Congress also gave express authority to the Board in Section 3(b) of the Act to delegate to its regional directors the authority to conduct elections, which the Board has proceeded to do. Regional Directors Delegation of Authority, 26 F. R. 3911; N. L. R. B. Rules and Regulations and Statements of Procedure, Sections 102.62, 102.69, 26 F. R. 3885. In fact, such delegation with its decentralization of authority is the heart of the Board's

scheme for discharging its election functions under the Act. With respect to elections following a stipulation between the employer and the union, as in this case, the delegation is very broad: "Such election shall be conducted under the direction and supervision of the Regional Director. The method of conducting the election and the postelection procedure shall be consistent with that followed by the Regional Director in conducting elections pursuant to Sections 102.69 and 102.70." Board's Rules and Regulations, Section 102.62(b).

The importance and virtual necessity of such a delegation to the regional directors is manifest. In the past five years alone, the Board's thirty-one regional offices have conducted a total of over thirty-eight thousand elections involving more than two and three-quarter million employees in every part of the United States (Twenty-Ninth through Thirty-Third Annual Reports of the National Labor Relations Board, for the years 1964-1968). This huge volume of elections in a wide variety of industries and under varying local conditions could hardly be conducted other than by means of the regional offices, which are in a unique position to adapt the election procedures to the individual conditions of each case.

The court below set aside the election in this case and denied enforcement of the Board's bargaining order on the sole ground that the regional director failed to furnish multilingual ballots (Spanish and English) in accordance with what the court deems to be the uniform practice in the *other* regional offices of the Board.

Assuming, *arguendo*, that the practice of all of the other regional offices was to use multilingual ballots, the court below is nevertheless in fundamental error. Neither the Act nor the Board's Rules require the use of multilingual ballots. The Board, within its statutory authorization, has

delegated to the regional director the authority to conduct the election in a method consistent with his own practice. Board's Rules and Regulations, Rule 102.62(b). It has long been the rule of this Court that the reviewing courts may not require consistency or uniformity of agency action. In *Virginian Railway Company* v. *U. S.*, 272 U. S. 658, 663, 665-666 (1926), the Court, through Mr. Justice Brandeis, said, "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province." 272 U. S. at 663! The Court has continued to approve that standard of judicial review. *Accelerated Transport-Pony Express, Inc.* v. *U. S.*, 227 F.. Supp. 815, 820-821 (D. C. Vt., 1964), affirmed 379 U. S. 4 (1964).

The court below holds that the Board's regional directors must adhere to an agency wide procedure instead of exercising their discretion concerning the details of election procedures. Thereby the court erroneously asserts the power to substitute its own procedural rules for those adopted by the Board. But this is in direct conflict with the repeated holdings of this Court in matters of administrative agency review. In *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940), the Court overruled a court of appeals which had substituted its own rule of procedure in place of that adopted by the F. C. C. This Court held that if a change in agency procedural rules is desirable, it is for Congress to accomplish this by legislation, and that the court of appeals was not authorized to write its own principles into the statute. The Court said, 309 U. S. at 143, that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." The decision below conflicts also with the recent decision of this Court in *F. C. C.* v.

Schreiber, 381 U. S. 279, 290-291 (1965), where the Court held that judicial action "to establish administrative procedures *de novo* would of course render nugatory Congress' effort to insure that administrative procedures be designed by those most familiar with the regulatory problems involved. Thus in providing for judicial review of administrative procedural rule-making, Congress has not empowered district courts to substitute their judgment for that of the agency."

The test of the validity of the Board's action is not whether the court of appeals could fashion a better election procedure. The proper tests for judicial review under the teaching of this Court as in *Schreiber, supra*, 381 U. S. at 291, are whether the Board has the statutory power to decide what kind of ballots to use in elections, and whether it acted arbitrarily. Unquestionably the Board does have authority to decide what kind of ballots to use. The statutory delegation of authority to conduct elections necessarily includes the authority to decide on the kind of ballots. The Board also was authorized by Congress to delegate that authority to the regional director, which it did.

In approving the regional director's decision to use English ballots, in this case, the Board did not act arbitrarily. Its decision in this case adequately sets forth reasons for its ruling (A 19-20). In advance of the election, Notices of Election, adequately explaining the election in both Spanish and English, were posted by the employer throughout the plant on the bulletin boards customarily used for notices to employees, with sample ballots attached in the form actually used at the polls (A 1, 2). The ballots stated a simple "Yes"/"No" choice. The Board noted that the word "No" is the same in both languages, and that gainfully employed persons in an American plant in Chicago would know the meaning of the word "Yes". The Board also pointed out that the Company and the Union had each provided observers at the election who spoke both English and Spanish and that the observers

certified on the tally that the election was fairly conducted. Significantly, as the Board observed, there was no showing that *any* voter misunderstanding had occurred during the election. The fact that more than five hundred employees voted without any instances of difficulty over the language on the ballot is of course the most eloquent refutation of any speculation about possible prejudice. See *A. J. Tower, supra*, 329 U. S. at 334-335.

The Board approved the Regional Director's choice of English-language ballots, holding that he had acted within his discretion.[2] The Board reviewed the conduct of the election and approved it by applying its usual standards, *i.e.*, whether the election assured an adequately informed expression by the employees, and whether "on facts presented in each case, the election has been carried out in a manner which assured the secrecy and security of the balloting." *Polymers, Inc.*, 170 NLRB No. 33 (1968); *Fibre Leather Mfg. Corp.*, 167 NLRB No. 51 (1967); *Thomas A. Nelson d/b/a Trio Metal Cap Co.*, 168 NLRB No. 105 (1968); *Laars Engineers, Inc.*, 173 NLRB No. 90 (1968); *Craft Manufacturing Co.*, 122 NLRB 341 (1958).

In setting aside the election because of the regional director's failure to follow a so-called uniform policy, the court below seriously endangers the statutory scheme for Board elections. It would be a practical impossibility for the thirty-one regional directors to follow identical election practices in the multitude of different situations they face in thousands of elections every year. Congress must be assumed to have known what it was doing when it authorized the Board to delegate election-handling to its regional

2. Public elections in Illinois are conducted in the English language. The Illinois Constitution requires all official documents and records to be in the English language. Constitution of Illinois 1870, Sched. § 18, reproduced in 1967 Ill. Rev. Stat. 27. In the *Tower* case, *supra*, 392 U. S. at 331, 332, this Court approved the Board's use of standards which conform to those followed in elections generally.

directors. If consistency as to the details of election practice among the various regions is to become the test for upholding elections, it is certain that a tremendous burden will be placed upon the agency personnel, to adhere slavishly to a myriad of bureaucratic devices. Objections to elections will multiply, based upon fly-specking comparisons of region-by-region procedures. Regional Directors will tend to avoid the legitimate exercise of discretion in fashioning election procedures to meet case by case requirements, for indeed the use of discretion will have become *per se* a basis for setting an election aside. Had Congress intended total uniformity it would have so provided. If, however, such a rule were to be imposed, it is for Congress and not the courts to do so. The clear intent of Congress in delegating the entire election process to the Board, and in leaving the Board free to fashion procedures through its delegation to regional directors, should be given effect. The writ should be granted in this case to review the decision which is not merely incorrect but which endangers the expeditious and effective discharge of the Board's vital functions in the conduct of elections under the Act.

2. The decision of the court below is in conflict with the provision of the Administrative Procedure Act, 5 U. S. C. § 706, that administrative action is not to be overturned merely because of non-prejudicial error. *Braniff Airways Incorporated* v. *C. A. B.*, 379 F. 2d 453, 466 (D. C. Cir., 1967). Assuming, *arguendo*, that the regional director here failed to follow a uniform policy of providing multilingual ballots, there is no showing that this resulted in any prejudice or harm in the conduct of the election. No eligible voter complained of any difficulty in voting the simple "Yes"/"No" ballot. Cf. *N. L. R. B.* v. *A. J. Tower, supra*, 329 U. S. at 334-335, wherein this Court adverted to the importance of the absence of actual voter complaints in a

consideration of the Board's election procedures. The wide margin of 299 to 203 by which the voters expressed their choice makes it clear that they well knew what the issue was. But the court below erroneously holds that prejudice or harm need not be shown, and that there is no burden upon the Company in attacking the election to show that there was prejudice (Opinion, A 11). This holding is contrary to the command of the Administrative Procedure Act, and it conflicts with the holdings on this issue in this Court and in other courts of appeals. In *N. L. R. B.* v. *Mattison Machine Works,* 274 F. 2d 347 (7th Cir., 1960), the court of appeals set aside a Board election because of an error in the employer's name on the election notices and ballots, holding in effect, like the court below, that even though the objecting employer was unable to show that the error caused confusion among the voters, the Board had the burden of proving there was no prejudicial error. This Court reversed, 365 U. S. 123 (1961). The Court in a *per curiam* opinion held that the burden rested on the employer to show that the error had affected the fairness of the election, and that "in the absence of proof by the employer that there has been prejudice to the fairness of the election such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order." In *Mattison,* the margin in the election was very close: 157 to 155 in favor of the Union. A *fortiori,* in this case where the margin was substantial, the rule against interfering with administrative action for harmless error should have been followed by the court below. The solicitude of the court below for enforcing literal adherence to formula, to the point of setting aside an election for harmless deviation, results in a frustration of the Congressional policy, and deprives those very people about whom the court expresses concern, of the bargaining agent which they chose by majority vote and

it deprives them of the fruits of collective bargaining. Because the Court of Appeals decided this case in flat conflict with the rule of this Court in *Mattison*, the writ should be granted in order that the error may be reviewed.[3]

With no prejudicial error shown in the record, the court below reaches its conclusion by speculation about a hypothetical possibility that some of the voters may not have understood the ballot (Opinion, A 11). Yet the Fifth Circuit has approved of the use of English-language authorization cards, signed by non-English speaking employees, to prove a union's majority status. *N. L. R. B.* v. *American Art Industries*, 415 F. 2d 1223, 1229 (5th Cir., 1969). The court in that case applied the decision of this Court in *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575, 608 (1969), where the Court said "We therefore reject any rule that requires a probe of an employee's subjective motivation as involving an endless and unreliable inquiry." Nevertheless, in the present case the circuit court engages in a hypothetical probe of the state of mind of non-objecting voters to reach a conclusion that the voters may not have known what was involved in a simple "Yes"-"No" choice on the ballot. It is unthinkable that the court would consider itself free to invalidate a carefully controlled Board election because of the use of English-language ballots under the discretion of the experienced regional director, while approving authorization cards in the English lan-

3. *N. L. R. B.* v. *Seine and Line Fisherman's Union of San Pedro*, 374 F. 2d 974, 981 (9th Cir., 1967), cert. denied, *sub. nom. Biazevich* v. *N. L. R. B.*, 389 U. S. 913 (1967); *N. L. R. B.* v. *Parkhurst Manufacturing Company*, 317 F. 2d 513, 518 (8th Cir., 1963); *N. L. R. B.* v. *Red Bird Foods*, 399 F. 2d 600, 602 (7th Cir., 1968); *N. L. R. B.* v. *Carolina Natural Gas Corp.*, 386 F. 2d 571, 575 (4th Cir., 1967); *Kerner* v. *Celebrezze*, 340 F. 2d 736, 740 (2d Cir., 1965), cert. denied *sub. nom. Kerner* v. *Gardner*, 382 U. S. 861 (1965); see also *Yale Transportation Corp.* v. *U. S.* 185 F. Supp. 96, 107 (D. C. S. D. N. Y., 1960) affirmed *per curiam*, 365 U. S. 566 (1961); *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *U. S.*, 377 U. S. 235, 248 (1964).

guage which were obtained without any government supervision and without any bilingual notices.

3. The conclusion of the court below that there is a uniform Board policy concerning the use of multilingual ballots is erroneous.[4] The court bases its conclusion solely upon a series of letters which were solicited by the Company some nine months after the election[5] (R. 71-104).

4. An analysis of the record reveals that:

(a) four regional offices of the Board did not set forth any policy (Regions 1, 6, 11, 26; R. 75, 80, 84, 99).

(b) eighteen regional offices indicated in substance that they would exercise discretion *depending on the facts in each case* (Regions 2, 4, 5, 7, 10, 12, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 29, 31; R. 75, 76, 78, 79, 81, 83, 85, 87-94, 97, 98, 103).

(c) two regions and one subregion provide multilingual notices but ballots are in English, except that when *all* voters are Spanish one of these regions furnishes Spanish notices and ballots (Regions 8, 13, subregion 38; R. 82, 86, 104).

(d) one regional office will furnish foreign language notices and ballots on a case by case basis where a *majority of* the voters do not speak or understand English (Region 30; R. 102).

(e) four regional offices provide multilingual notices and ballots when the parties so request (Regions 3, 22, 23, 28; R. 76, 95, 96, 100).

(f) two regional offices and two subregional offices did not reply (Regions 9, 27, subregions 36, 37).

As Region 8 furnishes Spanish language ballots only when *all* voters are Spanish speaking, and Region 30 furnishes Spanish language ballots only when a *majority* are Spanish speaking, neither of those offices would have furnished Spanish language ballots in the circumstances of this case. The failure of the court below to deal with the actual facts is thus glaringly illustrated. The opinion below (A 7) specifically refers to Milwaukee, assuming incorrectly that in Milwaukee the employees would have had Spanish ballots. In fact Milwaukee, which is Region 30, would have denied Spanish ballots because fewer than a majority of the employees herein were Spanish speaking (R. 102).

5. The Company waived the right to a pre-election hearing when it signed the stipulation for an election (R. 5). The question of multilingual ballots could have been raised in such a hearing, and in the event of an adverse ruling by the Regional Director

The letters are from a number of regional Board offices and from an assistant executive secretary of the Board and what the letters reveal is that the Board has both permitted and encouraged its Regional Directors to establish diversified approaches to the problem of language differences among voters.

The letter from the assistant executive secretary, while referring to a "uniform policy", indicates that the regional directors decide the question as they deem it necessary (R. 74). The "uniform policy" thus consists of uniformly leaving the question to the discretion of the Regional Director, a policy clearly jeopardized by the decision below.

The Thirteenth Region centering in Chicago covers one of the most heavily industrialized and most diverse ethnic areas in the country. From the inception of the Act until the time of this case, huge steel mills, auto plants and countless other industries have had elections of bargaining agents in elections conducted pursuant to the policy of the regional director of that office, and collective bargaining has developed as the Congress intended. This Court would certainly take judicial notice of the fact that in an area such as Chicago the work force in a single plant may include numerous ethnic groups. Obviously in such cases discretion must be exercised, and Congress has directed that the discretion should be that of the Board and not of the Court of Appeals.

It is late in the day for the court below to substitute its judgment for that of the Board to invalidate an election conducted with the expertise that only this agency possesses.

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the Company could have appealed it to the Board. Rules and Regulations and Statements of Procedure, §§ 101.20, 102.63, 102.67(b), (c); 101.21(d). The Company made no protest over the Regional Director's decision to use English ballots until the election was over.

CONCLUSION.

For the reasons herein set forth, this Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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NLRB 707
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A1

APPENDIX A.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NOTICE OF ELECTION

RIGHTS OF EMPLOYEES

Under Section 7 of the National Labor Relations Act, employees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

PURPOSE OF ELECTION

An election by secret ballot will be conducted, under the supervision of the Regional Director of the National Labor Relations Board, among the eligible voters described herein, to determine the representative, if any, desired by them for the purpose of collective bargaining with their employer.

SECRET BALLOT

The election will be by SECRET ballot. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to the Regional Director or his agent in charge of the election. Your attention is called to Section 12 of the National Labor Relations Act:

ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN $5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

An agent of the Board will hand a ballot to each eligible voter at the voting place. The voter will then mark his ballot in secret in a voting booth and fold it. The voter will then personally deposit the folded ballot in a ballot box under the supervision of an agent of the Board. A majority of the valid ballots cast will determine the results of the election.

Incorporated herein, for your information only, is a copy of the official ballot.

AUTHORIZED OBSERVERS

Each of the interested parties may designate an equal number of observers, this number to be determined by the Regional Director or his agent in charge of the election. These observers will (a) act as checkers at the voting place and at the counting of ballots, (b) assist in the identification of voters, (c) challenge voters and ballots, and (d) otherwise assist the Regional Director or his agent.

ELIGIBILITY RULES

Employees described under VOTING UNIT in this Notice of Election who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off and employees in the military service of the United States who appear in person at the polls shall be eligible to vote. Also eligible are those employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period, and their replacements. Employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated prior to the date of the election, and employees engaged in an economic strike which commenced more than 12 months prior to the date of the election and who have been permanently replaced, shall not be eligible to vote.

CHALLENGE OF VOTERS

The challenge of a voter MUST be made before the voter has deposited his ballot in the ballot box.

INFORMATION CONCERNING ELECTION

The Act provides that only one valid representation election may be held in a 12-month period. Any employee who desires to obtain any further information concerning the terms and conditions under which this election is to be held or who desires to raise any question concerning the holding of an election, the voting unit, or eligibility rules may do so by communicating with the Regional Director or his agent in charge of the election.

Marriott In-Flite Servies Division of Marriott-Hot Shoppes, Inc.

VOTING UNIT

13-RM-831
Stipulation

Those eligible to vote are all full time and regular part-time employees engaged in food, beverage, and equipment preparation, assembly, handling, receiving, storage and packing, including maintenance employees, food and equipment handlers, food and equipment helpers, dispatchers, coordinators and plant clerical employees employed at the Employer's Shoppes No. 392 and 395, O'Hare International Airport, Chicago, Illinois and the Employer's Shoppe No. 391 at 9864 Leland Avenue, Schiller Park, Illinois who were employed during the payroll period ending February 11, 1966, but excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

DATE: March 13, 1966

(1) Shoppe 392	(2) Shoppe 391	(3) Shoppe 395
9:00 am to 11:30 am	7:00 am to 8:30 am	7:00 am to 8:30 am
4:00 pm to 6:00 pm	1:00 pm to 3:00 pm	1:00 pm to 3:00 pm
8:00 pm to 9:00 pm	7:00 pm to 8:00 pm	7:00 pm to 8:00 pm
Procurement area near back dock	Cream Room	Dry food storage room, lower level

Employees may vote during working hours and will be released to vote by a Board agent in accordance with a schedule to be posted by the Employer. Employees who are unable to vote during their scheduled voting times will be released to vote at other times during voting hours by a Board agent. If an employee is not working during one or more of the scheduled voting periods, he may vote at any time during these voting periods.

UNITED STATES OF AMERICA

National Labor Relations Board

OFFICIAL SECRET BALLOT

FOR CERTAIN EMPLOYEES OF

MARRIOTT IN-FLITE SERVICES DIVISION OF MARRIOTT-HOT SHOPPES, INC.

SAMPLE

DO you wish to be represented for purposes of collective bargaining by -

LOCAL 300, UNITED INDUSTRIAL WORKERS OF AMERICA, TRANSPORTATION SERVICES AND ALLIED WORKERS, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
☐	☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE

U.S. GOVERNMENT PRINTING OFFICE 1962 O—706-870

NLRB 707 (SP)
(7-61)

A2

ESTADOS UNIDOS DE AMERICA
JUNTA NACIONAL DE RELACIONES DEL TRABAJO

AVISO DE ELECCION

DERECHOS DE LOS EMPLEADOS

Bajo el Artículo 7 de la Ley Nacional de Relaciones del Trabajo, los empleados tienen el derecho a organizarse, constituir, ingresar en o ayudar a organizaciones obreras, negociar colectivamente a través de representantes seleccionados por ellos mismos, y a participar en actividades concertadas con el propósito de negociar colectivamente u otro fin de ayuda o protección mutua, y también tendrán derecho a abstenerse de participar en cualesquiera de dichas actividades o todas ellas.

PROPOSITO DE LA ELECCION

Una elección por papeleta secreta se llevará a cabo bajo la supervision del Director Regional de la Junta Nacional de Relaciones del Trabajo entre los votantes elegibles aquí descritos, para determinar el representante, si alguno, que ellos desean con el fin de negociar colectivamente con su patrono.

PAPELETA SECRETA

La elección será por medio de papeleta SECRETA. A los votantes se les permitirá votar sin intervención, restricción o coerción. No se permitirá hacer campaña electoral en o cerca del sitio de votar. Las violaciones a estas reglas deberían ser informadas inmediatamente al Director Regional o a su agente a cargo de la elección. Se llama su atención hacia la Sección 12 de la Ley Nacional de Relaciones del Trabajo:

CUALQUIER PERSONA QUE VOLUNTARIAMENTE RESISTA, EVITE, IMPIDA O INTERVENGA CON CUALQUIER MIEMBRO DE LA JUNTA O CUALQUIERA DE SUS AGENTES O AGENCIAS EN EL DESEMPEÑO DE SUS DEBERES EN EL CUMPLIMIENTO DE ESTA LEY, SERA CASTIGADA CON UNA MULTA DE NO MAS DE $5,000 O PRISON QUE NO EXCEDERA DE UN AÑO, O AMBAS PENAS.

Un agente de la Junta entregará una papeleta a cada uno de los votantes elegibles en el sitio de votar. El votante entonces marcará la papeleta secretamente en una caseta de votar y la doblará. Entonces el votante personalmente depositará la papeleta doblada en una urna electoral bajo la supervisión de un agente de la Junta. La mayoría de las papeletas válidas depositadas determinarán los resultados de la elección.

Para su información únicamente se incorpora aquí una copia de la papeleta oficial.

OBSERVADORES AUTORIZADOS

Cada una de las partes interesadas puede nombrar igual número de observadores, cuyo número ha de ser determinado por el Director Regional o su agente a cargo de la elección. Estos observadores tendrán que: (a) actuar como verificadores en el sitio de votar y al contarse las papeletas, (b) ayudar en la identificación de los votantes, (c) recusar votantes y papeletas, y (d) en cualquier otra forma ayudar al Director Regional o a su agente.

REGLAS DE ELEGIBILIDAD

Los empleados descritos bajo UNIDAD DE VOTANTES en este Aviso de Elección que no trabajaron durante el período de nómina que se ha designado por haber estado enfermos o de vacaciones a suspendidos temporalmente, y los empleados que estén en las fuerzas armadas de los Estados Unidos que acudan personalmente a la elección, serán elegibles para votar. También son elegibles aquellos empleados que participen en una huelga económica que haya comenzado menos de doce (12) meses antes de la fecha de la elección y que hayan retenido su status como tales durante el período de elegibilidad, y los empleados que los han reemplazado. Aquellos empleados que han dejado el trabajo o que hayan sido despedidos por causa a partir del período de nómina designado y aquellos empleados que participen en una huelga quienes hayan sido despedidos por causa desde que comenzó la misma, y quienes no han sido reempleados o reinstalados antes de la fecha de la elección, y aquellos empleados que participen en una huelga económica que comenzó más de 12 meses antes de la fecha de la elección y quienes han sido reemplazados permanentemente, no serán elegibles para votar.

RECUSACION DE VOTANTES

La recusación de un votante DEBE ser hecha antes del votante depositar su papeleta en la urna electoral.

INFORMACION CONCERNIENTE A LA ELECCION

La Ley dispone que sólo una elección válida de representación podrá celebrarse dentro de un período de doce meses. Cualquier empleado que desee obtener información adicional concerniente a los términos y condiciones bajo los cuales se llevará a cabo esta elección, o que desee plantear cualquier cuestión concerniente a la celebración de una elección, la unidad de votantes o reglas de elegibilidad, lo podrá hacer comunicándose con el Director Regional o su agente a cargo de la elección.

Marriott In-Flite Services Division of Marriott-Hot Shoppes, Inc. — 13-RM Estipulación

UNIDAD DE VOTACION

Tendrán derecho a votar todos los trabajadores trabajando sea todo el tiempi o part-time en la preparación de alimentos,bebidas o equipo,en el montaje,manejo, recepción,almacenaje y embalaje,incluyendo trabajadores de mantenimiento,manejadores de alimentos y equipos,ayudantes en alimentos y equipo,despachadores,coordinadores y oficinistas en la planta quienes trabajaron durante el período de la planilla de salarios que terminó el 11 de Febrero de 1966,en los Talleres de la Compañía Nos.392 y 395,al Aeropuerto Internacional O'Hare,Chicago,Illinois y en Taller No.391 de la Compañía en 9864 Leland Avenue,Schiller Park,Illinois,pero se excluyen los oficinistas de la Administración,los vigilantes,los empleados técnicos y los supervisores según lo determinado bajo la Ley.

FECHA: 18 de Marzo de 1966

(1) Taller 392	(2) Taller 391	(3) Taller 395
9:00 am a 11:30 am	7:00 am a 8:30 am	7:00 am a 8:30 am
4:00 pm a 6:00 pm	1:00 pm a 3:00 pm	1:00 pm a 3:00 pm
8:00 pm a 9:00 pm	7:00 pm a 8:00 pm	7:00 pm a 8:00 pm
Area de Procuramento cerca de doque posterior	Sala de Crema	Almacén de aliméntos deshidratados, nivel inferior.

Los trabajadores podrán votar durante horas de trabajo y obtendrán permiso para votar por un agente de la Junta de acuerdo a un horario que enseñará la Compañía. Los que no podrán votar durante las horas programadas de votación recibirán permiso para votar durante otras horas de votación por el agente de la Junta. De no trabajar durante uno o más de los horarios de votación programados, tal obrero podrá votar en cualquier momento durante los períodos de votación señalados.

UNITED STATES OF AMERICA

National Labor Relations Board

OFFICIAL SECRET BALLOT

FOR CERTAIN EMPLOYEES OF

MARRIOTT IN-FLITE SERVICES DIVISION OF MARRIOTT-HOT SHOPPES, INC.

MUESTRA

Do you wish to be represented for purposes of collective bargaining by -

LOCAL 300, UNITED INDUSTRIAL WORKERS OF AMERICA, TRANSPORTATION SERVICES AND ALLIED WORKERS, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
☐	☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.

If you spoil this ballot return it to the Board Agent for a new one.

940892

ESTE ES EL UNICO AVISO OFICIAL DE ESTA ELECCION Y NO DEBE SER MUTILADO POR NADIE

U.S. GOVERNMENT PRINTING OFFICE 1961 OF—601650

APPENDIX B.

OPINIONS BELOW.

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 26177.

MARRIOTT IN-FLITE SERVICES DIVISION OF MARRIOTT CORPORATION,
Petitioner-Respondent,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent-Petitioner.
AND REVERSE TITLE.

PETITION TO REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD (FLORIDA CASE).

(October 7, 1969)

Before WISDOM and CARSWELL, *Circuit Judges*, and ROBERTS, *District Judge*.

WISDOM, *Circuit Judge:* Marriott In-Flite Services Division of Marriott Corp. challenges the manner in which the Labor Board conducted a representation election, and par-

ticularly the Board's refusal to provide ballots in Spanish for Spanish-speaking employees. We agree with the employer that the Board's policies do require that foreign-language ballots be available where a substantial number of eligible employees do not speak English, and that such ballots must be provided to allow a fair election. We therefore set aside the order of the Board.

Marriott, with its principal place of business in Georgia, employs about 640 people in three "flight kitchens" at O'Hare Airport near Chicago. The company provides food and beverages for airlines to use on their flights.

On February 9, 1966, Local 300, United Industrial Workers of America, Seafarers International Union of North America, AFL-CIO asked for recognition by Marriott as the statutory bargaining agent for employees of the O'Hare kitchens, on the ground that it had an authorization-card majority. Marriott withheld recognition, and filed a petition for an election with the Board's Office for Region 13 in Chicago.

On February 21 lawyers for the union and the company met with a representative of the Regional Office to agree upon election procedures and details. Both sides asked that the Board provide election notices and ballots in Spanish as well as English, since one-third of the employees in the unit spoke and understood Spanish only. The Board representative agreed with regard to the notices and said that he would arrange for ballots in Spanish if the Board's policies permitted them. The union and the company then signed a stipulation, incorporating the various procedures to apply at the consent election. They agreed, among other things, that

> "... Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board."

The election notices distributed by the Board were, except for a sample ballot, bilingual. At the election on March 18 however, only ballots in English were provided. The union won the balloting, 299 to 203 with 60 ballots challenged and still unopened. The company filed objections to the election on March 25, alleging 15 separate defects, and requested a hearing on any relevant issues of fact. The Regional Director recommended, without a hearing, overruling 14 of the 15 objections on the basis of the evidence submitted by the parties. He directed a hearing on the other issue, whether the election should be set aside because of certain alleged threats, coercion, and violence. Under Section 102.69 (d) and (e) of its rules, the Board ordered the recommended hearing, after which the hearing examiner concluded that the company's objection should be overruled. The Board then adopted the findings of the hearing examiner as well as the findings of the Regional Director on the remaining issues. It certified Local 300 as the bargaining agent for the unit on June 16, 1967. The company, however, refused to bargain with the union. The union filed unfair labor practice charges under § 8(a) (5) of the Act. The Board held that the election had been valid, and ordered the company to bargain with Local 300 as the statutory bargaining agent for the unit.

I.

Marriott directs our attention first to the Labor Board's policy and practice with regard to foreign-language ballots.[1] The Board, in conducting representation elections, has almost uniformly provided such ballots where foreign speaking employees comprise a substantial portion of the eligible

1. The unfair labor practice procedure is, of course, a proper method of obtaining review of the record of the representation election proceedings. See, *e.g.*, *NLRB* v. *Tampa Crown Distributors, Inc.*, 5 Cir. 1959, 272 F. 2d 470.

voters. The record in the case before us contains letters to Marriott's lawyer from the Board's regional offices about their respective practice in this regard. Of those regions in which the question had been raised, only one, Region 13 (where this case originated), replied that it does not provide foreign-language ballots. The eighteen other regions that had considered the problem stated unanimously that they had or would, when the occasion arose, employ foreign-language ballots.[2] More importantly, the Associate Executive Secretary of the Labor Board declared that "the Agency does have a uniform policy" on such ballots, and he went on to describe it:

> "As the [Regional] Director deems it necessary, election notices in a foreign language may be posted and in such cases, the foreign language used on the notice should also appear on the ballot. Because many of our Regions have no recourse to such a procedure, it is understandable that some of them may have advised you that their policy is contrary to that stated above."

Further indication of the Board's policy appears in Fibre Leather Mfg. Corp., 1967, 167 NLRB No. 57, 66 LRRM 1056, in which the Board set aside an election where only English ballots had been available, and where less than one-fourth of the eligible voters could not understand English. There the Board said,

> "we are not satisfied that the conditions under which the election was conducted were such as to assure the effective and informed expression by all employees of their true desire." 66 LRRM at 1057.

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2. Replying affirmatively were Regions 2 (New York), 3 (Buffalo), 4 (Philadelphia), 7 (Detroit), 8 (Cleveland), 12 (Tampa), 15 (New Orleans), 16 (Fort Worth), 17 (Kansas City), 20 (San Francisco), 21 (Los Angeles), 22 (Newark), 23 (Houston), 24 (San Juan), 28 (Albuquerque), 29 (Brooklyn), 30 (Milwaukee), and 31 (Los Angeles).

Region 8 said that it provides foreign-language ballots only when all members of the unit speak the same foreign language.

In contrast with the Board's "uniform policy", Region 13 at the time this case arose had a policy *never* to grant foreign-language balloting. The regional office wrote to Marriott's lawyer that "all our ballots are printed in English and we have made no exception to this rule". Region 13, in other words has refused in the past to make even the case-by-case determination of need mandated by the "uniform policy" of the Board in Washington. (We should stress the reference to the past, because Region 13 has more recently announced that it will in the future provide foreign-language ballots where a language problem exists. This about-face further points up the isolated nature of the Region's former rule requiring English ballots.)

From the record before us it appears, therefore, that the Board, through its agents, allowed employees certain rights in one geographic area, and different, more extensive, rights in all other geographic areas without offering any justification for the disparate treatment. The agency fails to explain why the difficulties Chicago employees have with English condemn them to more restricted voting rights than those enjoyed by similarly handicapped workers in Milwaukee. If the agency establishes a general policy and then departs from it, judicial approval of the departure will be withheld in the absence of an explanation. Thus in *Rayonier, Inc.* v. *NLRB*, 5 Cir. 1967, 380 F. 2d 187, we denied enforcement of a Board order and quoted approvingly the following language of Judge Aldrich:

> " 'The Board is free, of course, to make changes in policy, but the seriousness of this one, if that is what it is, would call not only for deep and mature thought, but for the assembly of the most cogent reasons. In the Board's opinion I find neither.' Northeast Airlines v. C. A. B., 1 Cir. 1964, 331 F. 2d 589." 380 F. 2d at 190.

Similarly, Judge Brown, concurring in *Mary Carter Paint Co.* v. *FTC*, 5 Cir. 1964, 333 F. 2d 654, *rev'd on other grounds*, 1965, 382 U. S. 46, 86 S. Ct. 219, 15 L. Ed. 2d 145, pointed out that

> "[the] law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."

That description fits exactly the Board's conduct here.

More recently, in *Delta Drilling Co.* v. *NLRB*, 5 Cir. 1969, 406 F. 2d 109, this Court set aside an election in which the Board's agent had stopped off at a union representatives's motel room while carrying the ballots away from the polling place. No evidence of ballot-tampering appeared. We noted, however, that the agent's behavior violated "established Board policy", ... F. 2d at ....., and that "[s]uch policies are controlling until the Board announces a change and its reasons for the change." ..... F. 2d at ..... The Court in *Delta Drilling* also stressed the binding nature of a consent agreement, saying that an employer who enters into it "relying upon the unflinching preservation of Broad policy, is entitled to the benefit of the reliance". ..... F. 2d at ..... In our case, as in *Delta Drilling*, the consent agreement provided that election procedures would follow Board policy, and the agreement is therefore an added reason for requiring adherence to that policy.

The Board in its brief denies that it follows the practices and policies attributed to it by Marriott. It notes that in *Fibre Leather Mfg. Corp.*, neither the election notices *nor* the ballots had been bilingual, while in the present case at least the notices had been printed in Spanish. The Board also points to the decision in Thomas A. Nelson d/b/a Trio

Metal Cap. Co., 1967, 168 NLRB No. 105, as further proof that the alleged policy does not exist. In *Nelson* the Board refused to set aside an election where the ballots had been in English only, but where the election notices had been bilingual.

We do not find these arguments persuasive. The grounds for distinguishing *Fibre Leather*; *i.e.* the absence of bilingual election notices are clearly refuted by the letter of the Associate Executive Director, which was written after *Nelson*, and which speaks explicitly of the need for foreign-language notices *and* ballots. Nor is it dispositive that the Board approved, after the fact, the Regional Director's denial of foreign-language ballots in *Nelson*. *Nelson* arose in Region 13, where the present case also originated. It merely emphasizes that that region was out of step with the rest of the country. The Board cannot, by retrospective adjudication, will away the policy that is actually being enforced by its agents and officers in day-to-day practice. After *Nelson*, as we noted, all regions save one continued to provide ballots in foreign languages; the Board accepted their policy as its own. As we said in *Delta Drilling*, "Board policy is to be ascertained by its acts and decisions". ..... F. 2d ..... The acts described by the various regions and summarized by the Associate Executive Director are what we look to here, and we cannot escape the fact that while Region 13 followed one rule, Washington and the other regions were following another.

More fundamental than the hobgoblin of little minds is the requirement that minimum standards of fairness must be met for an election to be valid:

> "In election proceedings, it is the function of the Board to provide 'a laboratory' in which an experiment to determine the uninhibited desires of the employees may be conducted under conditions as nearly ideal as possible. When and if the standards of elec-

> tion campaigning drop too low, the requisite laboratory conditions are not present, and the experiment must be conducted over again. General Shoe Corporation, 77 NLRB No. 18, 21 LRRM 1337, 1341 (1949)."

See also *Electra Mfg. Co.* v. *NLRB*, 5 Cir. 1969, ... F. 2d ....., *Tyler Pipe and Foundry Co.* v. *NLRB*, 5 Cir. 1969, ..., F. 2d ....., and *NLRB* v. *Monroe Auto Equipment Co., Hartwell Div.*, 5 Cir. 1969, ... F. 2d .....

An election in which one-third of the electorate has no access to ballots in language that it can understand necessarily falls below the minimum laboratory standards of fairness. The "uniform policy" of the Board in providing such ballots does not prove that they are required by statute, but it is evidence of their importance. Even without that evidence, however, common sense leads us to the same conclusion: it would be whimsical to establish meticulous safeguards against coercion,[3] misinformation,[4] and corruption[5] if a sizeable portion of the electorate, though untrammeled in its choice, does not know how to exercise it. We can think of few things more fundamental to a democratic selection of labor representatives that the ability of the polity to cast an intelligent vote.

The Board's brief does not dispute this point. It emphasizes instead the auxiliary methods, other than the printed ballot, by which the Spanish-speaking voter might have been managed to vote according to his choice. The Board points to the bilingual election notices, the presence of Spanish-speaking officials at the polls, and the simple "yes-no" choice that appeared on the ballot. Even those who did not receive help from the officials, says the Board,

3. See, *e.g.*, *NLRB* v. *Tampa Crown Distributors, Inc.*, 5 Cir. 1959, 272 F. 2d 470.

4. See, *e.g.*, *Electra Mfg. Co.* v. *NLRB*, 5 Cir. 1969, F. 2d.

5. See, *e.g.*, *Delta Drilling Co.* v. *NLRB*, 5 Cir. 1969, F. 2d.

could hardly have mistaken the basic English words "yes" and "no".

We do not find the curative effects of notices and observers, or the simplicity of the ballot adequate to save this election. Notices are not always read. (The ones here contained no sample ballot in Spanish anyway.) Voters may be embarrassed about their unfamiliarity with English and may either vote in ignorance or stay away from the polls. Moreover, the voter's ability to recognize "yes" and "no" may not put an end to his problems. As Marriott points out, he must read the question and instructions on the ballot as well, and these may prove more troublesome. These are possibilities that cannot be resolved by speculation. Given the initial defect of improperly denied ballots, the party challenging the election should not have to prove actual prejudice to the outcome. That apparently was the conclusion the the Board in *Fibre Leather*. In that case there were no void ballots cast, in contrast to the 80 percent of the eligible voters who cast ballots in the Marriott election, more than 98 percent did so in *Fibre Leather*. Furthermore, just as no one in the present case asked for help in voting, a factor cited by the Board, so too in *Fibre Leather* "no employee approached either of the bilingual observers to ask a question or request assistance".[6]

---

6. In *Delta Drilling*, 406 F. 2d at 112 this Court quoted with approval the following language from Athbro Precision Engineering Corp., 166 NLRB No. 116, 65 LRRM 1699:

> "The Employer does not claim any violation of the integrity of the ballot box, nor does it claim that the conduct of the Board Agent had any effect upon the four employees who later voted. Rather, it objects that the behavior of the Board Agent gave an appearance of irregularity to the conduct of the election thus departing from the standards of integrity which the Board seeks to maintain.
>
> "The Regional Director, while observing that a Board Agent in charge of an election should not fraternize with a representative of one of the parties in the interim between two

The Board further suggests that in a labor election provisions should not be read to grant voters' rights that are more liberal than those guaranteed in political elections, citing *NLRB* v. *A. J. Tower Co.*, 1946, 329 U. S. 324, ... S. Ct. ....., 91 L. Ed. 322. The Supreme Court in *Tower* made no such holding, but did say, among other things that,

> "the Board must act so as to give effect to the principle of majority rule set forth in § 9(a), a rule that 'is sanctioned by our governmental practices by business procedure, and by the whole philosophy of the democratic institutions. S. Rep. No. 573, 74th Cong. 1st Sess. p. 13. It is within this democratic framework that the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.' 329 U. S. at 331, ... S. Ct. at ....., 91 L. Ed. at 327."

The Court also stressed the need for "practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud." 329 U. S. at 331. The practical problems of providing ballots for every linguistic minority in a large state are quite different from the practical problems of providing 200 ballots in one language and 440 in another. What comprises fairness to the minority in the one case does not necessarily define fairness

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balloting periods, nevertheless did not recommend setting aside the election. Although the Board Agent's conduct did not affect the votes of employees, we do not agree that this is the only test to apply.

"The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.

"In the circumstances of this case we hereby sustain the Employer's objections. Accordingly, we shall set aside the election and direct that a second election be held."

to the minority in the other. If nothing else, the "uniform policy" of the Board attests to the feasibility of accommodating foreign-speaking employees.

II.

The intervenor, Local 300, and the Board both argue that even if the company had a valid objection to the balloting procedure, the objection was lost when the company failed to appeal before the election from the Regional Director's decision. The record shows, however, that the Stipulation for Certification Upon Consent contained a commitment from the Board to conduct the election according to the "applicable procedures and policies of the Board". Since, as we have said, the Board's policy supported the request made by both the union and the company at the time, and since the Board's agent had agreed to provide Spanish ballots if policy permitted, there was no need to pursue the matter farther. No waiver occurred.

Accordingly, we set aside the election of March 18, 1966 and direct that another election be held. We find no merit to the employer's other contentions.

ENFORCEMENT DENIED.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

MARRIOTT IN-FLITE SERVICES, DIVISION OF MARRIOTT CORPORATION, *Petitioner-Respondent,* *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent-Petitioner.*	No. 26177.

JUDGMENT.

Before: WISDOM and CARSWELL, *Circuit Judges,* and ROBERTS, *District Judge.*

THIS CAUSE came on to be heard upon the petition of Marriott In-Flite Services Division of Marriott Corporation, to review an order of the National Labor Relations Board dated May 24, 1968, directed against Marriott In-Flite Services Division of Marriott Corporation, its officers, agents, successors, and assigns, and upon the Board's cross-application for enforcement of its order. The Court heard argument of respective counsel on June 18, 1969, and has considered the briefs and transcript of record filed in this cause. On October 7, 1969, the Court being fully advised in the premises, handed down its decision denying enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that enforcement of the order of the National Labor Relations Board directed against Marriott In-Flite Services Division of Marriott Corporation, its officers, agents, successors, and assigns be and it hereby is denied.

ENTERED: October 7, 1969.

APPENDIX D.

171 NLRB No. 102 — D-679
Chicago, Illinois

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

MARRIOTT IN-FLITE SERVICES, DIVISION OF MARRIOTT CORPORATION,[1] and LOCAL 300, UNITED INDUSTRIAL WORKERS OF AMERICA, TRANSPORTATION SERVICES AND ALLIED WORKERS, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO.	Case No. 13-CA-7971.

DECISION AND ORDER.

Upon a charge filed by Local 300, United Industrial Workers of America, Transportation Services and Allied Workers, Seafarers International Union of North America, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint dated August 9, 1967, against Marriot In-Flite Services, Division of Marriott Corporation, herein called Respondent, alleging that

1. Pursuant to a stipulation of the parties at the hearing, the name of the Respondent was amended to reflect the successorship of Marriott Corporation to the business of Marriott-Hot Shoppes, Inc., in 1967.

the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on or about June 16, 1967, the Union was duly certified by the Board[2] as exclusive representative of Respondent's employees in the unit found appropriate by the Board and thereafter on June 26, 1967, requested that the Respondent bargain with it; that since on or about June 27, 1967, and thereafter the Respondent has refused and is refusing to recognize or bargain with the Union as such exclusive bargaining representative, although the Union has requested and is requesting it to do so. On August 21, 1967, the Respondent filed its Answer, denying the commission of the unfair labor practices and alleging as affirmative defense that the National Labor Relations Board lacks jurisdiction because the Respondent is not an employer within the meaning of Section 2(2) of the Act and its employees are not employees within the meaning of Section 2(3) of the Act, but are employees under the Railway Labor Act; and further that it should have been granted a new election, particularly with respect to its Objection No. 10 wherein the Regional Director refused to supply foreign language ballots, and that the election held did not give rise to a valid election or certification.

On August 24, 1967, the General Counsel filed with the Board a Motion for Summary Judgment, asserting, in view of the admissions by the Respondent contained in its Answer, Respondent's failure to deny or explain certain other allegations of the Complaint, and its written admissions an-

2. Decision and Certification of Representative in Case No. 13-RM-831, unpublished.

nexed as appendices to the moving papers, that there are no issues of fact or law requiring a hearing, and praying the issuance of a Decision and Order finding the violations as alleged in the Complaint. Shortly therafter, the Charging Party filed a Motion for Summary Judgment joining in the General Counsel's argument in support of its motion. In addition, it moved that the Board's remedy for the violation include compensation for all employees of the Respondent for the "monetary value of the minimum additional benefits, if any, including wages, which it is reasonable to conclude that the Union would have been able to obtain through collective bargaining with the (R)espondent" as recommended by the Trial Examiner in *Ex-Cell-O Corporation*, Case No. 25-CA-2377.[3] On August 29, 1967, the Board issued an Order Transferring Proceeding to the Board, and on the same date, a Notice to Show Cause on or before September 12, 1967, why the General Counsel's Motion for Summary Judgment should not be granted. On September 27, 1967, the Respondent filed an Answer to said Notice to Show Cause and a brief in support.

Pursuant to the provisions of section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board makes the following:

Ruling on Motion for Summary Judgment.

In its Answer to Show Cause and Memo in Support, Respondent contended that the question of its status as an employer under Section 2(2) of the Act should be certified to the National Mediation Board, or the proceeding

3. We deem it inappropriate in this case to depart from our existing policy with respect to remedial orders in cases involving violations of Section 8(a)(5), and therefore deny the remedy requested. *Monroe Equipment Company*, 164 NLRB No. 144.

remanded to a Trial Examiner for hearing on this question; that the underlying certification is invalid because foreign language ballots were not provided as the Board has since seen fit to provide in *Fibre Leather Mfg. Co.*, 167 NLRB No. 51; that Respondent is entitled to a hearing at some stage of the proceeding to determine whether the totality of the conduct objected to destroyed laboratory conditions for the underlying election; that summary judgment is inappropriate because of new evidence with respect to Respondent's Objection No. 10 concerning foreign language ballots in that the same Region now provides foreign language ballots; and that Respondent, since July 1, 1967, is entitled under Section 3 of the Administrative Procedure Act to consult internal directives of the Board "some of which undoubtedly pertain" to Board procedures with respect to foreign language ballots, which Respondent views as previously unavailable "evidence" entitling it to a hearing on its Objection No. 10.

Respondent's request for a hearing on the Section 2(2) question has since been granted with the results hereinafter indicated. The other contentions constitute an attempt to relitigate matters fully litigated during the representation proceeding, including the Respondent's contention that it is now entitled to a hearing on Objection No. 10.[4]

4: We distinguish *Fibre Leather Mfg. Corp.*, 167 NLRB No. 51, which issued in September 1967, in that the Notices of Election posted in that case were in English only, whereas here the Notices were provided in Spanish as well as English. The sample ballot attached to both the Spanish and English notices was printed in English, in the form distributed at the polls. Thus a sample ballot in English was available for advance consideration by the employees along with notices explaining the election procedure in both languages. In addition, the ballot was a simple one, having the name of only one union and the usual squares for marking by the voter, one with "yes" written above and one with "no". The word "no" is the same in both Spanish and English. We are not persuaded that Spanish speaking employees gainfully employed in the United States fail to comprehend that "yes" and "si" mean the same thing. In supplying ballots in English along

The record before us establishes that on February 11, 1966, the Employer filed a petition in Case No. 13-RM-831, seeking to determine whether the Union represents employees in the unit found appropriate herein. An election was conducted March 18, 1966. The tally of ballots showed that there were approximately 618 eligible voters, and that 563 ballots were cast, of which 299 were for the Union, 203 against the Union, 60 were challenged, and 1 was void.

On March 25, the Respondent timely filed objections to the conduct of the election, and to the conduct affecting the results of the election. The Board deferred ruling on the Regional Director's Report and ordered a hearing before a Hearing Officer for the purpose of taking testimony to resolve the issue raised by the Respondent in its Objection No. 12.[5] The hearing was held September 26, 27, 28, and 30 and October 5, 18, 20, and 26, following which the Hearing Officer issued his "Report on Objection No. 12," dated January 6, 1967, concluding that the evidence of conduct presented by the Respondent failed to support either of its

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with notices in appropriate foreign languages, the Regional Director for Region 13 has in the past proceeded on the principle that secrecy of the ballot is, to a degree, violated whenever a block of votes, by reason of language, can be identified when counted. The Regional Director, we believe, was within his discretion in so proceeding. The view that ballots and notices should ordinarily be in the same language is also sound. Here we note the lack of any showing that voter misunderstanding resulted from the English ballots explained by the Spanish Notices of Election. The Respondent's contention that there "may" have been language confusion is entirely speculative. The official observers for both parties included observers who spoke both Spanish and English, the Respondent having one such observer at all voting sessions and the Union one at most sessions. These observers certified on the Tally that the election was fairly conducted. We are satisfied that it was. See *Thomas A. Nelson, d/b/a Trio Metal Cap Co.*, 168 NLRB No. 105, and *Polymers, Inc.*, 170 NLRB No. 33.

5. The objection, entitled "Violence and Coercion," alleged: Certain employees were subjected to threats, coercion, and violence by persons supporting the Union, including tire slashing, which created an atmosphere of fear and interfered with free choice."

theories of union misconduct or an atmosphere of violence, and recommending that the objection be overruled. Thereafter, the Board considered the Hearing Officer's Report, the Respondent's exceptions to said Report, as well as the remaining objections, and on June 16, 1967, overruled all the objections and certified the Union as representative of the employees in the appropriate unit. Thereafter, on July 24, 1967, the Board denied the Employer-Petitioner's (Respondent here) motion for reconsideration by the full Board urging that the Regional Director's failure to furnish ballots in Spanish, as well as English, was a departure from Board policy and practice in other regions, and his refusal to set the election aside was arbitrary inasmuch as Region 13 now provides foreign language ballots; the Board also denied the request of Employer-Petitioner for oral argument.

In response to the Respondent's contention that the Board lacks jurisdiction because Respondent alleges that it is not an employer within the meaning of Section 2(2) of the Act, and its employees allegedly are not employees within the meaning of Section 2(3) of the Act but are employees under the Railway Labor Act, the Board on November 16, 1967, remanded the proceeding for a hearing before a Trial Examiner "for the purpose of adducing evidence limited to the sole issue of whether or not the Respondent is an 'Employer' within the meaning of Section 2(2) of the National Labor Relations Act." After a hearing, Trial Examiner David S. Davidson issued his Decision on February 6, 1968, in the above-entitled proceeding in which he concluded that "Respondent is not a company controlled by a carrier or carriers within the meaning of the Railway Labor Act, is not subject to the provisions of the Railway Labor Act, and is an employer within the meaning of the National Labor Relations Act," as set forth in the attached Trial Examiner's Decision. Thereafter,

Respondent filed exceptions to the Decision and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the brief, and hereby adopts the Trial Examiner's recommendation that the Board reject Respondent's defense that it is not an employer within the meaning of Section 2(2) of the Act and that the Board proceed to rule on the Motion for Summary Judgment.

As all the material issues have been previously decided by the Board, are admitted by Respondent's Answer to the Complaint, or stand admitted by the failure of Respondent to controvert the averments of the General Counsel's motion, there are no further matters requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted.

On the basis of the record before it, the Board makes the following:

Findings of Fact.

I. *The Business of Respondent.*

Respondent is, and has been at all times material herein, a corporation duly organized and existing by virtue of the laws of the State of Delaware, engaged in the business of providing in-flight food services for various airlines at O'Hare International Airport, Chicago, Illinois, and Schiller Park, Illinois. During the past year, which is representative of all material times herein, Respondent purchased and received goods valued in excess of $50,000 directly from sources located outside the State of Illinois and shipped goods valued in excess of $50,000 directly to sources located outside the State of Illinois.

Although it stipulated to the above facts in the Stipulation for Certification Upon Consent Election in the representation proceeding in Case No. 13-RM-831, Respondent now contends that its relationship to common carriers by air bring it within the coverage of the Railway Labor Act and thus is exempt as an employer under Section 2(2) of the National Labor Relations Act. Based on the stipulated commerce facts and the finding of the Trial Examiner, which we have adopted, we find that Respondent is, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act and engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved.*

Local 300, United Industrial Workers of America, Transportation Service and Allied Workers, Seafarers International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(6) and (7) of the Act.

III. *The Unfair Labor Practices.*

A. *The representation proceeding.*

1. *The Unit.*

The following employees at the Respondent's O'Hare International Airport, Chicago, Illinois, and Schiller Park, Illinois, places of business, constitute a unit appropriate for collective bargaining within the meaning of the Act:

> All full-time and regular part-time employees engaged in food, beverage, and equipment preparation, assembly, handling, receiving, storage and packing, including maintenance employees, food equipment handlers, food and equipment helpers, dispatchers, coordinators, and plant clerical employees, but exclud-

ing office clerical employees, guards, professional employees, and supervisors as defined in the Act.

2. *The Certification.*

On or about March 16, 1966, a majority of the employees of Respondent in the unit, in a secret election conducted under the supervision of the Regional Director for Region 13, designated the Union as the representative for the purpose of collective bargaining with Respondent, and on June 16, 1967, the Board certified the Union as the exclusive collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

B. *The request to bargain and the Respondent's refusal.*

Commencing on about June 26, 1967, and continuing to date, the Union requested and is requesting the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Since June 27, 1967, and continuing thereafter, Respondent did refuse, and continues to refuse, to bargain collectively with the Union as exclusive collective-bargaining representative of its employees in the appropriate unit, and, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. *The Effect of the Unfair Labor Practices Upon Commerce.*

The acts of the Respondent set forth in Section III, above, occurring in connection with its operations as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The Remedy.*

Having found the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

VI. *Conclusions of Law.*

1. Marriott In-Flite Services, a Division of Marriott Corporation, is an Employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 300, United Industrial Workers of America, Transportation Services and Allied Workers, Seafarers International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees engaged in food, beverage, and equipment preparation, assembly, handling, receiving, storage and packing, including maintenance employees, food equipment handlers, food and equipment helpers, dispatchers, coordinators, and plant clerical employees; but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 16, 1967, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 27, 1967, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Marriott In-Flight Services, Division of Marriott Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with Local 300, United Industrial Workers of America, Transportation Services and Allied Workers, Seafarers International Union of North America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time employees engaged in food, beverage, and equipment preparation, assembly, handling, receiving, storage and packing, including maintenance employees, food equipment handlers, food and equipment helpers, dispatchers, coordinators, and plant clerical employees; but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is

reached, embody such understanding in a signed agreement.

(b) Post at its O'Hare International Airport, Chicago, Illinois, and Schiller Park, Illinois, places of business, copies of the attached Notice marked "Appendix".[6] Copies of said Notice, on forms provided by the Regional Director for Region 13, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said Notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 13, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C., May 24, 1968.

FRANK W. McCULLOCH,
Chairman,

JOHN H. FANNING,
Member,

GERALD A. BROWN,
Member,
National Labor Relations Board.

(SEAL)

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6. In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words, "a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT refuse to bargain collectively with LOCAL 300, UNITED INDUSTRIAL WORKERS OF AMERICA, TRANSPORTATION SERVICES AND ALLIED WORKERS, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All full-time and regular part-time employees engaged in food, beverage, and equipment preparation, assembly, handling, receiving, storage and packing, including maintenance employees, food equipment handlers, food and equipment helpers, dispatchers, coordinators, and

plant clerical employees; but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

MARRIOTT IN-FLITE SERVICES,
DIVISION OF MARRIOTT CORPORATION
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 881 U. S. Courthouse and Federal Office Building, 219 S. Dearborn Street, Chicago, Illinois 60604 (Tel. No. 828-7570).

TXD-70-68
Chicago, Ill.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners

Washington, D. C.

MARRIOTT IN-FLITE SERVICES, DIVISION OF MARRIOTT CORPORATION[1] and LOCAL 300, UNITED INDUSTRIAL WORKERS OF AMERICA, TRANSPORTATION SERVICES AND ALLIED WORKERS, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO.	Case No. 13-CA-7971.

Stephen B. Rubin, Esq., of Chicago, Ill., for the General Counsel.

Irving Friedman, Esq., of *Katz and Friedman*, Chicago, Ill., for the Charging Party.

John T. Weise and *R. Theodore Clark, Jr., Esqs.*, of *Seyfarth, Shaw, Fairweather and Geraldson*, Chicago, Ill., for the Respondent.

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE CASE.

DAVID S. DAVIDSON, *Trial Examiner:* Pursuant to charges filed on July 24, 1967, by Local 300, United Indus-

1. Pursuant to a stipulation of the parties at the hearing, the name of the Respondent was amended to reflect the successorship of Marriott Corporation to the business of Marriott-Hot Shoppes, Inc. in 1967.

trial Workers of America, Transportation Services and Allied Workers, Seafarers International Union of North America, AFL-CIO, hereinafter referred to as the Union, a complaint issued on August 9, 1967, alleging that Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union after the Union had been certified as the representative of employees in an appropriate unit in Case No. 13-RM-831. Respondent in its answer admitted some allegations of the complaint, denied others, and raised two affirmative defenses. On August 24, 1967, the General Counsel filed a Motion for Summary Judgment with the Board. The proceeding was transferred to the Board, and a Notice to Show Cause why the General Counsel's Motion should not be granted issued on August 29, 1967. On August 31, 1967, the Union filed its separate Motion of Charging Party for Summary Judgment, and on September 27, 1967, Respondent filed its Answer to Notice to Show Cause opposing summary judgment. In it Respondent alleged, among other things, that it is a "carrier" within the meaning of the Railway Labor Act and therefore not an Employer within the meaning of the National Labor Relations Act, as amended, so that the Board is without jurisdiction in this matter.

By its Order of November 16, 1967, the Board remanded the proceeding to the Regional Director for a hearing before a Trial Examiner "for the purpose of adducing evidence limited to the sole issue of whether or not the Respondent is an 'Employer' within the meaning of Section 2(2) of the National Labor Relations Act." The Board's Order provided that "upon the conclusion of the hearing, the Trial Examiner shall prepare and serve upon the parties a Decision containing findings of fact, conclusions of law, and recommendations which he finds warranted by the evidence received at the hearing, . . ."

The hearing was held before me in Chicago, Illinois, on December 18, 1967. At the close of the hearing oral argument was waived, and the parties were given leave to file briefs, which the General Counsel and Respondent filed.

Findings and Conclusions.

I. The Facts.

With one minor exception indicated below, the facts were established either by stipulation or through uncontradicted testimony of the senior area supervisor of the Chicago operations of Respondent's In-Flite Services Division, which are the operations involved in this proceeding.

Mariott Corporation is a publicly held corporation licensed to do business in Illinois and a number of other states. Sometime in 1967, Marriott Corporation succeeded to the business of Marriott-Hot Shoppes, Inc., and has engaged in substantially the same business as the predecessor corporation. Previously in 1964 Marriott-Hot Shoppes, Inc., had succeeded to the business of Hot Shoppes, Inc.

Marriott Corporation has seven operating divisions and a number of staff services all under the supervision and control of the directors and officers of Marriott Corporation. The Hotel Division is in the business of operating nine Marriott Motor Hotels and Marriott Motor Hotel Restaurants in seven states, including one located in Chicago, Illinois, near O'Hare International Airport. The Service Restaurant Division is in the business of operating approximately 40 Hot Shoppes table service restaurants in 8 states and the District of Columbia. The Food Operations Division is in the business of operating 25 cafeterias in 8 states and the District of Columbia, including a location in Calumet, Illinois; and is also in the business of operating food service facilities in approximately 25 school,

hospital, industrial, and commercial locations in 6 states and the District of Columbia. The Manufacturing, Marketing and Procurement Division is in the business of operating a central supply and quality control facility known as Fairfield Farm Kitchens in Maryland to service other operating divisions. The Thruway and Turnpike Division is in the business of operating approximately 18 turnpike restaurants and snack bars in 3 states. The Big Boy Restaurants of America Division is in the business of operating 18 restaurants in California and approximately 400 franchise operations on the West Coast.

The remaining division, the In-Flite Services Division, is in the business of operating approximately 19 flight kitchens, referred to by Respondent as shoppes, in 8 states, including No. 391 in Schiller Park, Illinois, and Nos. 392 and 395, both at O'Hare International Airport, the operations directly involved in this proceeding.

All hourly paid employees of the operating divisions of Marriott Corporation, except those of Big Boy Restaurants of America, receive their paychecks from the principal offices of Marriott Corporation, are entitled to participate in the same credit union, profit sharing, and group insurance programs, and receive the same paid sick leave and vacations.

In-Flite Services Division employs approximately 12 percent of the employees of Marriott Corporation's operating divisions. It does not own or operate any airplanes, and from 1965 to the date of the hearing did not carry any passengers or cargo for hire or any United States mail by airplane. No certificates of public convenience and necessity have been issued by the Civil Aeronautics Board, the Federal Aviation Agency, or the Interstate Commerce Division to Marriott Corporation or any of its predecessors or operating divisions. The National Mediation Board had

not asserted jurisdiction over Marriott Corporation, Marriott-Hot Shoppes, Inc., Hot Shoppes, Inc., Marriott In-Flite Services Division, Hot Shoppes Caterers, Inc., Hot Shoppes Food Services, Inc., National Caterers of New York, Inc., or American Caterers, Inc.[2]

John Donald is area supervisor over the operations of the three Chicago shoppes, and he is also the manager of shoppe 392. Shoppes 391 and 395 have separate managers. A central purchasing agent located at shoppe 392 makes all the food purchases for the shoppes. Large equipment purchases, such as trucks, ovens, and other kitchen equipment, are made through Respondent's corporate headquarters for the three shoppes. Respondent has a central maintenance garage at which it maintains and repairs its trucks under the supervision of a garage manager. The garage manager purchases parts and fuel for the trucks. Another central maintenance crew maintains Respondent's kitchen equipment.

A single personnel manager located at shoppe 392 handles personnel matters for the three shoppes pursuant to personnel procedures established by Respondent's headquarters industrial relations department. He is responsible for all hiring for the three shoppes. Discharges of employees at all three shoppes require the approval of Donald. Employee assignments are determined by Respondent's supervisors. Except as set forth below, the airlines for which Respondent supplies food have nothing to do with the hiring, discharge, assignment, or direction of Respondent's employees. Conversely, Respondent's supervisors have no responsibility over airline personnel. Respondent's employees at its three Chicago shoppes are considered to

2. Apart from those entities already identified, those named are either predecessor corporations or former subsidiaries of them which have been involved in earlier NLRB proceedings. All have been absorbed by Respondent.

be covered by the provisions of the Fair Labor Standards Act.

Respondent has a written contract entered into by its predecessor Hot Shoppes, Inc. with American Airlines which sets forth the relationship between Respondent and Amercan Airlines.[3] Under this contract, Respondent agrees to perform catering services to the satisfaction of American Airlines in compliance with regulations, procedures, standards, and specifications set forth in American's Passenger Service Manual—Catering Service Edition, its Food and Beverage Specifications, and its Catering Service Schedule. A schedule of prices is incorporated in the agreement with provision for adjustment from time to time upon reasonable demand by either party, with a procedure provided for resolution of any disputes by reference of the dispute to an independent firm of certified public accountants for binding determination. The contract provides that such prices are to be "reasonable, fair and equitable to both parties in the light of all applicable factors including cost of raw food, labor, equipment, and all other basic costs related to the operation of the catering service."

Under the agreement, Respondent is obligated to secure all proper and necessary licenses and permits for its operations and to abide by all applicable federal, state, local, and airport rules, regulations, and ordinances. Respondent is obligated to obtain and maintain statutory workmen's compensation insurance and public and automobile liability insurace with insurers satisfactory to American and naming American as an additional assured. Respondent is obligated to indemnify, defend, and hold harmless American against all claims, liability, losses, or expenses arising

3. According to Donald, its terms substantially deserибe the relationship between Respondent and the other airlines served by it at O'Hare. Contracts between Respondent and the other airlines were not introduced.

out of or in connection with the performance of the catering services.

The agreement provides that it will remain in effect for a period of 5 years from September 6, 1962, with automatic renewal for additional periods of 1 year in the absence of 90 days' notice of intention to terminate. In the event either party deems the other to have failed substantially in performance of its obligations, it may terminate the agreement upon 30 days' notice specifying the nature of the breach if the offending party fails to take diligent and reasonable steps to remedy it. Any disputes as to sufficiency of cause for termination may be referred to final and binding arbitration. Until final decision is rendered, the agreement is to remain in effect. Both parties are excused from any failure of performance due to strikes, boycotts, labor disputes, and other causes beyond control of the parties. Respondent's obligations and rights may not be assigned to a third party without the consent of American.

The agreement provides:

> Persons employed or used by Hot Shoppes in the performance of its obligations hereunder shall not be considered employees of American for any purpose, and particularly, but not exclusively, they shall not be considered employees of American under the provisions of any local, state, or federal unemployment compensation act or other form of social security legislation. Hot Shoppes hereby expressly accepts exclusive liability for any and all such taxes, contributions, or assessments imposed by such legislation by virtue of Hot Shoppes' employment or use of such persons.

The agreement requires Respondent to supply and maintain at its expense all trade equipment, fixtures, and devices, including high-lift trucks required for efficient operations. It provides that American will supply and maintain

at its expense airplane service equipment required to serve food and beverages in aircraft, with Respondent to comply with reasonable instructions and specifications of American respecting the use and cleaning of such equipment.

The agreement also provides:

> American shall have the right at all reasonable hours to inspect the flight kitchen, other equipment, and facilities employed by Hot Shoppes hereunder, and the food and services supplied by Hot Shoppes hereunder. Hot Shoppes shall use its best efforts to comply forthwith with all reasonable requests of American for the improvement of the in-flight food service furnished hereunder.

Shoppe 392 is located at O'Hare Airport near the flight ramp. It employs approximately 360 employees. Its sole customer is American Airlines, pursuant to the agreement just described. Shoppe 392 furnishes meal, snack, and beverage service for American Airlines flights leaving O'Hare. At 392, flight service equipment is received and cleaned, and raw food items are received, cleaned, cut, cooked, portioned, and packed ready to be served for delivery to aircraft. Respondent's employees classified as food and equipment handlers and helpers,[4] take food and beverages in carriers from the dispatch area of Shoppe 392 to the aircraft in high-lift trucks, owned by Respondent. At the aircraft, they position the trucks at the aircraft, raise the body of the truck so that it is level with the galley door of the aircraft, unload dirty equipment from the galley, and load the prepared food. Just before each aircraft departs, food bank employees, who have carts with limited food storage facilities, check with the American Airlines gate agent to determine whether any last minute additions or removals of food are required and do whatever is required. Employees classed as coordinators,

4. About 60 employees fall in this category.

described as serving a public relations function, board some of the aircraft to inquire of stewardesses whether flight needs have been met.

As the agreement indicates, a number of the procedures followed by Respondent and its employees are prescribed by American Airlines. The airline specifies the sources from which about 90 percent of the food supplied it is to be purchased. The airline also specifies the brand name, type, and container to be purchased. Recipes, directions for food preparation, and portion sizes are also prescribed by the airline. Safety procedures for operating trucks on the airport are prescribed both by the airline and the airport management. In addition the airline also specifies safety equipment, such as wheel chocks and lift controls, to be used on or in conjunction with Respondent's trucks which service aircraft. The airline makes periodic maintenance checks of Respondent's trucks to insure that they comply with its standards. The food and equipment handlers and helpers place food and equipment in places in the aircraft galleys prescribed by the airline.[5] On occasion stewardesses make specific requests as to placement with which the handlers and helpers comply. Before leaving each aircraft, the food and equipment handlers are required to obtain a receipt from a stewardess, and in the event she discovers a shortage, the handlers must remedy it before getting the receipt.

All the equipment placed on aircraft in which food is carried or served is owned by the airline, as are the mobile carts used by the food bank employees.[6] Although Respond-

5. The food and equipment handlers and helpers are trained in the procedures to be followed in loading aircraft by Respondent's supervisors.

6. There are three such carts. Normally two employees are assigned at a time to the food bank service utilizing two of the carts. There is evidence that American Airlines reimburses Respondent for the wages paid the food bank employees apart from payments for catering services.

ent prepares liquor kits for the airline, the liquor is purchased and owned by the airline.[7]

American Airlines has a catering representative who spends about 60 percent of his working time at shoppe 392.[8] While there he spends some of his time in the office areas and some in production areas inspecting the operations to determine whether the airline's standards are being met. Each day he eats a sample meal.

If during the course of his inspections, the catering representative observes anything which he believes requires change or correction, he brings it to the attention of Respondent's manager, Donald, or its assistant managers. Every Monday, the catering representative has a menu meeting with Respondent's supervisors at which he reviews with them any complaints he has received during the previous week from flight stewardesses concerning Respondent's food, service, or personnel. It is left to Respondent's supervisors to determine what if anything should be done in response to the complaints. On occasion, the catering representative makes written complaints concerning the performance of Respondent's employees assigned to work on the flight ramp or in aircraft. In some instances he has requested that certain employees not be allowed to work on or around aircraft. Donald makes an independent investigation of these complaints after which he may honor the request by transferring an employee to another oper-

7. Respondent is responsible for the control and storage of the airline's liquor on its premises. The airline audits Respondent's liquor supplies and accounts each month.

8. There was some dispute as to the amount of time spent by the catering representative at shoppe 392. I have accepted Donald's estimate as a rough estimate of the total amount of the catering representative's working time spent by him in all areas of the shoppe premises. However, it is clear that the catering representative works only during the day, the shoppe operates 24 hours a day, and the catering representative is not in the shoppe between the hours of 6 p.m. and 8 a.m. of the next day.

ation or another part of shoppe 392 or he may discuss the matter with the catering representative and explain that he does not agree with the requested action.

The two other shoppes are operated in substantially the same fashion as 392. Shoppe 395 is located adjacent to 392 at O'Hare. It employs approximately 90 employees and prepares food for Braniff International Airlines, Pan American, BOAC, Air France, Lufthansa, S.A.S., and Air Canada. The purchasing, preparation, handling, transportation, and loading of food for these airlines is carried on in substantially the same fashion as in shoppe 392. The airlines served by 392 do not have full-time catering representatives, but Respondent deals with port stewards who have additional responsibilities apart from catering.[9] Braniff and Pan American together account for aproximately 60 per cent of the volume of shoppe 395. Like American Airlines, they specify the sources from which Respondent must buy the food used on their flights. The remaining airlines served by shoppe 395 do not.

Shoppe 391 prepares food for TWA flights leaving O'Hare and is located at Schiller Park, Illinois, about 1½ miles from TWA airport operations. Approximately 190 employees work there. Its operations are substantially the same as those at shopee 392 except that food and equipment handlers and helpers do not enter TWA aircraft. Their functions stop at the door of the aircraft where they hand food carriers and supplies to TWA employees inside the plane. TWA, like American, has a catering representative,

9. The amount of time spent by the port stewards at shoppe 395 is not indicated on the record but it is clear from the smaller volume of business which they do with Respondent and their additional duties that it is less than that spent by the American Airlines catering representative at 392.

and he has his office at shoppe 391 where he spends all of his time.[10]

II. Conclusions.

Section 2(2) of the National Labor Relations Act, as amended, provides: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any person subject to the Railway Labor Act, as amended from time to time, ..."

The Railway Labor Act,[11] provides:

> Section 1. When used in this Act and for the purposes of this Act—First, the term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': . . . .
>
> Section 201. All of the provisions of Title I of this Act, except the provisions of Section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or

10. As in the case of shoppe 392, shoppe 391 operates on shifts, and its operations continue when the TWA catering representative is not on duty.

11. 45 U. S. C. § 151 *et seq.*

carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Section 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of the Act, except Section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee,' respectively, in Section 1 thereof.

The sole issue before me is whether Respondent, otherwise clearly an employer, is exempted from the definition of "employer" in Section 2(2) of the National Labor Relation Act because it is subject to the Railway Labor Act.

The National Labor Relations Board has asserted jurisdiction over the airline catering activities of Respondent and its predecessors, at O'Hare and elsewhere, on a number of occasions in the past.[12] The National Mediation Board has never asserted jurisdiction over Respondent or its predecessors, nor does it appear that it has ever been asked to. However, until raised by Respondent herein, the precise question before me does not appear to have been raised in the prior proceedings. In the last proceeding involving Respondent's Chicago in-flight service operations, Respondent contended that its employees were subject to the Railway Labor Act and therefore not "employees" within the

12. *National Caterers of New York, Inc.*, 129 NLRB 699 (1960), (Idlewild Airport); *Hot Shoppes, Inc.*, 130 NLRB 138 (1961), (Washington National Airport); *Hot Shoppes, Inc.*, 130 NLRB 144 (1961), (Midway and O'Hare Airports); *Hot Shoppes, Inc.*, 133 NLRB 3 (1961), (Idlewild Airport & Jamaica, New York); *Hot Shoppes, Inc.*, 139 NLRB 1253 (1962), (Friendship Airport); *Hot Shoppes, Inc.*, 143 NLRB 578 (1963), (O'Hare Airport and Schiller Park, Illinois); *Hot Shoppes, Inc.*, 146 NLRB 802 (1964), (Jamaica, New York); *Marriott In-Flite Services, a Division of Marriott-Hot Shoppes, Inc.*, 168 NLRB No. 59 (1957), (Kennedy Airport and Jamaica, New York).

meaning of Section 2(3) of the National Labor Relations Act.[13] In that case, the Board concluded that Respondent's employees were not "employees" within the meaning of the Railway Labor Act and denied the Employer's motion to dismiss the proceeding on jurisdictional grounds.[14]

In the prior proceeding, focus was on the definition of "employee" under the Railway Labor Act. Here attention is drawn to the definition of "carrier." The critical terms of Section 201, set forth above provide for coverage of "every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government." The General Counsel contends that Respondent fits neither branch of this definition of carrier and that the inquiry should end at this point. Respondent contends, however, that its relationship to common carriers by air brings it within the coverage of the Railway Labor Act.

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13. 143 NLRB 578. It is true that early in its Decision the Board stated that the Employer contended that the Board lacked jurisdiction over the proceeding under Section 2(2) and 2(3) of the Act, from which it would appear that Respondent's status as an employer as well as the status of its employees was raised. However, elsewhere in the Decision, the Board specifically stated that "it is not contended that the Employer itself is subject to the Railway Labor Act or that Section 2(2) of the Act, which excludes from the definition of 'employer' 'any person subject to the Railway Labor Act' requires our dismissal of the proceedings herein."

14. In its Answer to the Notice to Show Cause herein Respondent contended that (1) its entire business operation in Chicago and its relationship with the air carriers has changed substantially since the time of the Board's decision in 1963; (2) the location of Respondent's Chicago operations has changed in that two of Respondent's flight kitchens are now located on O'Hare Airport proper; (3) the air carriers served by Respondent and the terms and conditions under which service is provided have changed since 1963; and (4) the air carriers to whom Respondent provides service now exercise a greater degree of control and supervision with respect to the manner in which Respondent's employees perform their work. Except for the second point, the record does not establish the other changes asserted by Respondent.

Section 1, First, defining carriers by railroad includes within that term "any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . ." It is true, as the General Counsel points out, that when Congress extended the provisions of the Railway Labor Act to carriers by air it did not add a similar provision for coverage of companies owned or controlled by carriers by air. However, Section 202 provides with an exception not here material that the provisions of Title I of the Railway Labor Act shall apply "to said carriers by air and their employees in the same manner and to the same extent as though such carriers by air and their employees were specifically included within the definition of 'carrier' and 'employee' respectively in Section 1." While an argument can be made that the application of the Railway Labor Act to carriers by air provided in Section 201 does not expand the definition of a carrier by air contained in that section and the question is not free of doubt, there is authority to support coverage of companies owned or controlled by carriers by air as a result of a conjunctive reading of Sections 1, 201, and 202.[15] I find it unnecessary for purposes of this decision to resolve this question, and will assume, without deciding, that Respondent would come within the definition of carrier by air if it were "directly

15. See *Air Line Stewards, etc.* v. *Northwest Airlines, Inc.*, 267 F. 2d 170 (C. A. 8), cert. den. 361 U. S. 901; *Air Lines Stewards, etc.* v. *Trans World Airlines, Inc.*, 173 F. Supp. 396, aff'd 273 F. 2d 69 (C. A. 2), cert. den. 362 U. S. 988. See also Official Answer of the Assistant Solicitor, Department of Labor, 91 Wage Hour Manual (BNA) 909-911.

or indirectly owned or controlled by or under common control with'' any carrier by air.[16]

Respondent is not directly or indirectly owned by any carrier by air. But the question remains whether it is controlled by or under common control with any carrier by air. Respondent relies heavily upon the decision of the National Mediation Board in *Ohio & Western Pennsylvania Dock Company*, NMB No. C-3748 (June 21, 1967) in support of its contention.[17] In *Ohio & Western* the NMB asserted jurisdiction over an independent contractor performing services for the Pennsylvania Railroad Company,

16. See *Hot Shoppes, Inc.*, 143 NLRB 578, 580. In this connection, I also assume without deciding, that Respondent performs a service of the kind which Section 1 provides must be performed by companies owned or controlled by carriers as the second half of the test of coverage.

17. Other NMB and NLRB decisions relied upon by Respondent are of little aid or precedential value. In *ICC Ex Parte No. 72* (Sub No. 1) (December 7, 1938), the question was whether dining car employees on trains were "employees" within the meaning of the Railway Labor Act, and its facts are moreover distinguishable from those before me. See *Hot Shoppes, Inc.*, 143 NLRB 578, 581, n. 7. In *Airline Cuisine, Inc.*, NMB Case No. 3489 (June 30, 1961); *Ward Sky Cap Porter Service*, NMB Case No. R-3416 (May 2, 1960); *Thaddeus Johnson Porter Service, Inc.*, NMB Case No. R-3278 (July 11, 1958); and *International Air Services, Inc.*, NMB Case No. R-3555 (June 14, 1962); the decisions disclose no facts as to ownership or control on which assertion of jurisdiction was based nor do they indicate whether jurisdiction was raised as an issue before the NMB. In *Sky Chefs, Inc.*, Cases Nos. R-RC-1645, 2-RC-2122 (June 6, 1950), which is unpublished, the General Counsel and Respondent agree that the corporation over which the NLRB declined to assert jurisdiction and over which the NMB subsequently asserted jurisdiction (*Sky Chefs, Inc.*, NMB Case No. R-2601, September 24, 1962; *Sky Chefs Inc.*, NMB Case No. R-2670, May 15, 1953) was a wholly-owned subsidiary of American Airlines. Similarly in *Oakland Aircraft Engine Service, Inc.*, Case No. 20-RM-208, 39 LRRM 1368, the employer over which the Board declined to assert jurisdiction and a carrier by air were commonly owned. Contrary to Respondent's contention the factor of ownership is significant. To come within the definition of a carrier, a company which is not a carrier must be directly or indirectly owned or controlled by a carrier *and* engaged in related services.

a carrier by rail. In that case the dock company operated ore unloading equipment on a dock, unloading iron ore from vessels arriving at the dock on to railroad cars for direct shipment or on to the dock for storage and reloading for later shipment. The premises and dock on which the contractor operated and the equipment used by the contractor were owned by Pennsylvania Railroad. The services of the dock company were performed exclusively for Pennsylvania Railroad. The dock company acquired no interest, title or ownership in the ore being handled. The dock company was paid monthly at a fixed rate per ton for ore transferred, with agreement to renegotiate the rate from time to time. The railroad did not tell the dock company how to perform the work or supervise its employees. The dock company acted as agent for the railroad in collecting from owers or shippers of lading amounts designated by the railroad. Major repairs, replacements, the renewals were to be made by the dock company at the railroad's expense or by the railroad at its option. The railroad paid a portion of the wages of any employees taking scale readings in conjunction with the unloading operations. The railroad company paid costs of maintenance and operation of electric locomotives operated and maintained by the dock company, including reimbursement for Social Security, Workmen's Compensation and other taxes. The railroad fixed the amount of insurance to indemnify the railroad against damage due to fire or tornadoes approved the insurer and received an executed copy of the policy.[18] The dock company was not permitted to sublet or underlet any of the work without written approval of the railroad company. The decision does not indicate the duration of the agreement between the contractor and the railroad.

The NMB found that although none of the above facts

18. The agreement between the parties provided that the same was to be true of liability policies but the amount was fixed.

standing alone would be sufficient to establish control, taken together, they established that the dock company "has an intimate connection with the actual transportation concept and function" and that it rendered "its services for no other Company or carrier aside from the Pennsylvania Railroad, concededly a carrier subject to Section 1, First of the Act." The NMB concluded the dock company was properly subject to its jurisdiction.

Although some of the factors present in this case are similar to those disclosed by the NMB's *Ohio & Western* decision, there are a number of others which are dissimilar or not present in the *Ohio & Western* case.

There is no evidence that the airlines own or control the premises occupied by Respondent. Respondent owns the kitchen fixtures and equipment used in preparing food for the airlines and the trucks used in delivering it. Respondent purchases and owns at the time of preparation all the food and beverages, except liquor, which it sells to the airlines. Respondent performs and bears the cost of the maintenance of all its equipment. It does not act as an agent for the airlines for any purpose in their dealings with the public. While it is true that in this case unlike *Ohio & Western,* the airlines do tell Respondent in considerable detail how to perform the work and inspect to make certain that their specifications are met, they do not supervise the employees involved, and, if anything, the record before me shows less direction of Respondent's employees by airline personnel than disclosed by the earlier decision involving the same employees when their status as "employees" within the meaning of the Railway Labor Act was at issue.[19]

In *Ohio & Western* the service performed by the dock company was itself a direct step in the transportation of

19. 143 NLRB 578.

freight by the railroad. The dock company performed only this work and performed it only for a single carrier. Here the food service provided by Respondent to the airlines is ancillary to the transportation of passengers and freight. Respondent is a corporation generally engaged in the hotel and restaurant business, and the function it performs for airlines is related to its activities in providing food to industrial plants, schools, hospitals, highway travelers, and the general public.[20] Respondent does not perform its air catering services for a single airline, but does so for a number of airlines in Chicago and elsewhere.

Although Respondent's contract prices with American Airlines are subject to renegotiation and the contract is terminable upon 30 days' notice in the event of a substantial breach, the contract provides for means of resolving disputes over prices and performance through impartial arbitration, thus giving stability to the relationship between Respondent and the airline for the contractual term and diminishing the likelihood of indirect control which might flow from opportunity to terminate the contract unilaterally on short notice.

As set forth above, the agreement between Respondent and American Airlines provides specifically that persons employed or used by Respondent to perform its obligations under the contract are not to be considered the airline's employees for any purpose. Respondent's employees at shoppes 391, 392, and 395 are paid, like employees in all

20. While I deem the operations of Respondent not here directly involved relevant to the issue of Respondent's control by the carriers by air, it would not follow, as I understand the General Counsel to contend, that a finding that Respondent's operations at shoppes 391, 392, and 395 were subject to the Railway Labor Act woud deprive the NLRB of jurisdiction over Respondent's other operations. See *Northwest Airlines, Inc.*, 47 NLRB 498; *Northern Pacific Transport Company*, 89 NLRB 1561; *Jackson* v. *Northwest Airlines, Inc.*, 70 F. Supp. 501, aff'd 185 F. 2d 74 (C. A. 8), cert. den. 342 U. S. 812.

but one of Respondent's operating divisions, from its headquarters. They are entitled to receive the same fringe benefits as Respondent's other employees, and they are subject to the same, centrally originated, personnel policies as Respondent's other employees. Respondent independently hires, discharges, and supervises employees for the three shoppes, and although the airlines may on occasion request that individual employees not be allowed to work on or around aircraft, the basis for such requests is independently investigated and the requested action is not invariably taken.

Although several statutes employ definitions of carrier not materially different from that contained in the Railway Labor Act or incorporate its definition by reference,[21] there appears to have been little occasion for judicial consideration of the nature of the control intended by Congress to bring a company not itself operating as a carrier within the coverage of the Railway Labor Act. Howevr, I am persuaded from those authorities that I have found that control does not mean simply specification in some detail as to the nature of the services to be performed and the method used, but control of the management and business policy of the subordinate company.[22] Such control is not present here.

21. 26 U. S. C. A. § 3231(a); 29 U. S. C. A. § 213(b)(3); 42 U. S. C. A. § 410(a)(9), 45 U. S. C. A. § 288(a); 45 U. S. C. A. § 351(a). There is a common thread tieing these statutes together into a comprehensive scheme for regulating labor relations, working conditions, and retirement policy with respect to carriers as a class apart from other employers covered by a different system of regulation. It appears that Congress intended uniformity of interpretation of the definition of carrier in this legislation. See *Northern Pacific Railroad Co.* v. *Reynolds*, 68 F. Supp. 492, 494, aff'd 168 F. 2d 934 (C. A. 8), cert. den. 335 U. S. 828; *Martin* v. *Federal Security Agency*, 73 F. Supp. 482, 494, aff'd 174 F. 2d 364 (C. A. 3).

22. *Martin* v. *Federal Security Agency*, 174 F. 2d 364 (C. A. 3), affirming 73 F. Supp. 482; Railroad Retirement Board Regula-

I conclude on the facts set forth above that Respondent is not a company controlled by a carrier or carriers within the meaning of the Railway Labor Act, is not subject to the provisions of the Railway Labor Act, and is an employer within the meaning of the National Labor Relations Act.

Upon the basis of the above findings of fact and the entire record in this case, I make the following:

Conclusion of Law.

1. Respondent is an employer within the meaning of Section 2(2) of the National Labor Relations Act, as amended.

RECOMMENDATION.

Upon the basis of the foregoing findings of fact and conclusion of law, I recommend that Respondent's defense that it is not an employer within the meaning of Section 2(2) of the Act be rejected and that the Board proceed to rule on the General Counsel's Motion for Summary Judgment in the light of the findings and conclusion herein.

Dated at Washington, D. C.

/s/ David S. Davidson,
David S. Davidson,
Trial Examiner.

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tions 20 CFR 202.4, 202.5; Federal Tax Regulations under IRC 1954, § 31,3231(a)-1(b); Official Answer of the Assistant Solicitor, Department of Labor, 91 Wage Hour Manual (BNA) 909-911. See also 49 U. S. C. A. § 1(3)(b).

APPENDIX E.

STATUTES AND REGULATIONS.

Labor Management Relations Act, 1947, as Amended.

61 Stat. 136, 29 U. S. C. 151 *et seq.*:

* * * * * * *

NATIONAL LABOR RELATIONS BOARD.

* * * * * * *

SEC. 3. * * * (b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

* * * * * * *

REPRESENTATIVES AND ELECTIONS.

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * * *

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

* * * * * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * * * * *

National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as Amended 26 F. R. 3885.

* * * * * *

SEC. 102.62 *Consent-election agreements.*—(a) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into a consent-election agreement leading to a determination by the regional director of

the facts ascertained after such consent election. Such agreement shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70.

SEC. 102.69 *Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.*—(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. Any party may be represented by observers of his own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served on the other parties by the party filing them, and a statement of service shall be made.

* * * * *

26 F. R. 3911

NATIONAL LABOR RELATIONS BOARD

Regional Directors

Delegation of Authority

Pursuant to the provisions of section 3(a) of the Administrative Procedure Act (Pub. Law 404, 79th Cong., 2d Sess.), the National Labor Relations Board hereby separately states and currently publishes in the Federal Register the following Delegation of Authority to the Regional Directors of the National Labor Relations Board:

Pursuant to section 3(b) of the National Labor Relations Act, as amended, and subject to the amendments to the Board's Statements of Procedure, Series 8, and to its Rules and Regulations, Series 8, effective May 15, 1961, and subject to such further amendments and instructions as may be issued by the Board from time to time, the Board delegates to its Regional Directors "its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof."

Such delegation shall be effective with respect to any petition filed under subsection (c) or (e) of section 9 of the Act on May 15, 1961.

Dated, Washington, D. C., April 28, 1961.

By direction of the Board.

[SEAL]

Ogden W. Fields,
Executive Secretary.

Administrative Procedure Act, 5 U. S. C. Section 706.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.

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Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1039

LOCAL 300, UNITED INDUSTRIAL WORKERS OF AMERICA, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

MARRIOTT IN-FLITE SERVICES DIVISION OF MARRIOTT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

JOHN T. WEISE,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1039

LOCAL 300, UNITED INDUSTRIAL WORKERS OF AMERICA, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

MARRIOTT IN-FLITE SERVICES DIVISION OF MARRIOTT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals (A. 3-13)[1] is reported at 417 F. 2d 563 (5th Cir. 1969). The decision and order of the National Labor Relations Board (A. 16-28) is reported at 171 NLRB No. 102.

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1. "A." refers to Petitioner's appendix; "R. A." refers to Respondent's appendix attached hereto; and "R." refers to the joint appendix in the count below, a copy of which was filed with the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Whether the court below erred in setting aside an order of the National Labor Relations Board where one of the Board's regional directors failed to follow the uniform policy of providing foreign language ballots in a representation election where a substantial number of the eligible voters neither speak nor understand English.

STATUTES AND REGULATIONS INVOLVED.

In addition to the statutes and regulations set forth in the Petition, Section 101.19(b) of the Statements of Procedures of the National Labor Relations Board, Series 8, as amended, is also relevant. It is printed below in the Appendix.

STATEMENT.

Marriott In-Flite Services Division of Marriott Corporation (hereinafter referred to as "Employer") is engaged in airline catering on a nationwide basis. Involved in the instant case are three flight kitchens with approximately 600 employees on or near O'Hare International Airport, Chicago.

On February 9, 1966, Local 300, United Industrial Workers of America, Seafarers International Union of North America, AFL-CIO (hereinafter referred to as "Petitioner" or "Union") demanded recognition as bargaining agent (R. 105). The Union scheduled a strike to obtain Employer recognition without an election, but the Employer invoked the National Labor Relations Board election proce-

dures by filing a petition on February 11, 1966 (R. 1, 248). Thereafter, the Thirteenth Regional Office of the Board convened a consent election conference on February 21, 1966, where all election details were agreed upon. At this conference the Employer specifically requested foreign language ballots (R. A. 8-9):

> "Our attorney, Mr. Weise, advised the NLRB representative, Mr. Miller, that a sizeable portion of the electorate speak and understand Spanish only. Mr. Weise then requested that the Board provide Spanish election notices and also Spanish ballots. The Union Attorney, Mr. Friedman, joined in this request.
>
> "NLRB representative Miller replied that the notices would be in Spanish, but he questioned whether Board policy permitted foreign language ballots. The matter was concluded with an understanding between the parties, and Mr. Miller, that the ballots would be in Spanish as well as in English, if Board policy permitted a foreign language ballot, and if Board policy did not so permit, the ballots would be in English only. The Company received no further comment on this matter from the NLRB."

Thereupon, the parties executed an election stipulation known as a Stipulation for Certification Upon Consent Election which provided in pertinent part (R. A. 3):

> ". . . Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, *and the applicable procedures and policies of the Board.*" (Emphasis added.)

This election stipulation was entered into pursuant to a Board rule which provides that the Board, not its Regional Director, "makes the final determination of questions raised concerning . . . objections to the conduct of the election." National Labor Relations Board Statements of Procedure, Section 101.19(b).

Following execution of the foregoing stipulation, the Thirteenth Regional Office issued official election notices in Spanish and English, but the sample ballot on each election notice and the ballots actually used in the election were in English only (R. 25). The election was held on March 18, 1966 and 299 employees cast ballots for the Union, 203 employees cast ballots against the Union with 60 ballots challenged and still unopened (R. 8). Approximately one-third of those eligible to vote were Spanish-speaking employees who neither spoke nor understood English (R. 25).

The Employer filed Objections to Election on March 25, 1966, alleging 15 separate subjects of objectionable conduct pertaining to the conduct of the election itself and to conduct affecting the results of the election (R. 10-14). Objection No. 10 concerned the failure of the Regional Director to provide foreign language ballots.

The Regional Director of Region 13 recommended that Objection No. 10 be overruled (R. 25). On appeal, the Board in Washington upheld the Regional Director's recommendation. In addition, the Board upheld the Regional Director's recommendation overruling the Petitioner's other objections to the election and certified the Union as bargaining agent on June 16, 1967 (R. 164-167).

The Employer subsequently refused to bargain in order to obtain judicial review of the various issues which the Employer believed invalidated the election (R. 194).[2] In the ensuing unfair labor practice proceeding the Board held that the election and certification were valid and that the Employer had refused to bargain in violation of Section

2. "A refusal to bargain is a common method of challenging the Board's certification of a union since Board decisions in representation proceedings usually are not reviewable by courts of appeals." *NLRB* v. *Smith Industries, Inc.*, 403 F. 2d 889, 891 (5th Cir. 1968).

8(a)(5) of the Act (A. 16-30). The Employer then petitioned the Court of Appeals for the Fifth Circuit to set aside the Board's order. On October 7, 1969, the Court of Appeals, speaking through Judge Wisdom, issued its unanimous decision denying enforcement of the order on the ground that the Regional Director, contrary to uniform Board policy, failed to provide foreign language ballots for the approximately 200 Spanish-speaking employees who neither spoke nor understood English (A. 3-13). Circuit Judge Carswell and District Judge Roberts were the other two members of the panel.

REASONS FOR DENYING PETITION FOR WRIT.

1. The decision of the Court below was clearly correct. In denying enforcement of the Board's order, the Court of Appeals applied the well-established rule that actions of administrative and executive agencies cannot stand where the agency fails to observe the rules, procedures, and policies which it has established. *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959); *Service* v. *Dulles*, 354 U. S. 363 (1957); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954); *United States* v. *Heffner*, Docket No. 13,114 (4th Cir. 1969). *Cf. NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 605 (1969); *Yellin* v. *United States*, 374 U. S. 109 (1963). Thus the Court of Appeals held that the Regional Director of the Thirteenth Region failed to observe the Board's uniform practice and policy of providing foreign language ballots in representation elections "where foreign speaking employees comprise a substantial portion of the eligible voters" (A. 5-6).

A recent decision of the Fourth Circuit Court of Appeals demonstrates the correctness of the decision of the court below. In *United States* v. *Heffner*, No. 13,114 (4th Cir., December 30, 1969), the court stated, in relevant part:

"An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and the courts will strike it down. This doctrine was announced in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954). . . .

* * * * *

"Nor does it matter that these IRS instructions to Special Agents were not promulgated in something formally labelled a 'Regulation' or adopted with strict regard to the Administrative Procedure Act; the *Accardi* doctrine has a broader sweep. . . .

"These cases are consistent with the doctrine's purpose to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures. . . ."

2. The decision of the court below is not in conflict with decisions of this Court concerning the authority of the Board and its regional directors to conduct representation elections. In this regard, it is Petitioner's contention that a regional director has "the authority to conduct the election in a method consistent with his own practice" (Petition, p. 7). However, since neither the Petitioner nor the Board, raised this issue previously and since the court below did not treat this issue, it cannot now be raised for the first time in this Court. Petitioner "sought no ruling upon the question from the Board or the lower court and is therefore not entitled to have it decided here." *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 498 (1937).

But even assuming, *arguendo*, that Petitioner can properly raise this issue, it is nevertheless clear that regional directors do not have unlimited discretion in conducting representation elections. Certainly, regional directors do not have discretionary authority to violate the uniform election policies established by the Board itself. Thus, the Board has repeatedly set aside elections conducted by regional directors where elections were not conducted in

accordance with the Board's practices and policies. See, *e.g., Fibre Leather Manufacturing Corp.*, 167 NLRB No. 51, 66 LRRM 1056 (1967) (failure of regional director to provide foreign language ballots); *Yerges Van Liners, Inc.*, 162 NLRB 1259 (1967) (failure of regional director to provide all eligible voters an opportunity to vote). It is the responsibility of the Board, not its regional directors, to establish appropriate standards for the conduct of representation elections. And in establishing election standards it is the responsibility of the Board to see that they are uniformly applied. As the Board itself noted in *Stern Bros.*, 87 NLRB 16, 19 (1949), "Nor are we willing to set one standard for elections in New York City and another for the remainder of the country of which it is a part." All the court below did was to require that the Board abide by its own uniform policy of using foreign language ballots where a substantial portion of the eligible voters neither speak nor understand English.

It is clear from the stipulation in the instant case that it is the Board's procedures and policies, rather than the regional director's, that are to be followed. The stipulation expressly provided that the election would "be held in accordance with the . . . applicable procedures and policies *of the Board*" (R. A. 3). (Emphasis added.) This Court's decision in *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324 (1946), upon which Petitioner places primary reliance, is completely consistent with the opinion below in that this Court gave full effect to a similar provision in a consent election agreement, stating:

> " . . . nothing in the consent election agreement constituted a waiver of the policy by the Board. On the contrary, the agreement expressly stated that the election was to be held in accordance with 'the customary procedures and policies of the Board,' which would include the policy prohibiting post-election challenges." *Id.* at 333-334.

Certainly the court below was correct in concluding that the "applicable procedures and policies of the Board" included the policy of providing foreign language ballots. To hold otherwise would ignore the unchallenged statement by the Board's Associate Executive Secretary that "the Agency does have a uniform policy" of providing foreign language ballots (R. A. 10). That this "uniform policy" is applied uniformly in practice can be seen from the fact that every regional director in the country who has faced a foreign language problem supplies foreign language ballots, save the Regional Director in the instant case and the officer-in-charge of the subregion who reports to him (R. A. 11-12).

3. Petitioner's argument on delegation of authority is misplaced (Petition, pp. 5-7). Petitioner urges that a regional director has great discretion in conducting elections because the Board has delegated him authority to conduct elections. Yet, it requires a giant step to conclude that, because of the delegation, a regional director has the authority to violate the Board's own policies and practices in conducting elections. Quite to the contrary, the regional director is acting as the agent of the Board in conducting an election and must follow the Board's own policies and practices. Furthermore, in the case at bar, the Regional Director placed his signature on the election stipulation in which he expressly agreed to hold the election "in accordance with . . . procedures and policies of the Board" (R. A. 3).

Assuming, *arguendo,* that the Board delegation of authority to conduct elections gives the Regional Director license to violate the Board's own policies, that authority would not exist in the instant case. The Board Rules and Regulations and Statements of Procedure call for two types of election stipulation, one in which the parties agree that the Regional Director may make final decisions on post-

election disputes, including objections to the election, except for arbitrary actions, and one in which the parties to the stipulation specifically provide that the "Board, rather than the Regional Director, makes the final determination of questions raised concerning . . . objections to the conduct of the election." Board Statement of Procedures, §§ 101.19(a)(5), 101.19(b). Since the stipulation involved in the case at bar is of the latter type (R. A. 3-7), any argument on delegation of authority is completely misplaced.

4. Even assuming, *arguendo*, that the Regional Director is accorded some discretion with respect to whether foreign language ballots should be utilized, he did not exercise any discretion in refusing to provide foreign language ballots in the instant case. The record in the instant case thus shows that the Thirteenth Region had a hard and fast rule against providing foreign language ballots without any consideration whatsoever of the circumstances in individual cases. The record evidence is clear that the position of the Thirteenth Region was that "all our ballots are printed in English and *we have made no exception to this rule*" (R. A. 11). (Emphasis added.) The record also shows that in Subregion 38, which is under the direction of the Regional Director for the Thirteenth Region, this same inflexible policy was followed: "... ballots are always in English" (R. A. 12).

In the face of a *per se* rule in the Thirteenth Region not to provide foreign language ballots, the contention of Petitioner that the Regional Director properly exercised his discretion in determining that the circumstances in this case did not warant the use of foreign ballots has a hollow ring. The Regional Director did *not* exercise any discretion. As the Supreme Court noted in *The Styria* v. *Morgan*, 22 S. Ct. 731, 734 (1902):

" . . . 'discretion' implies the absence of a hard-and-

> fast rule. 'The establishment of a clearly defined rule of action would be the end of discretion . . . "

Accord, Langnes v. *Green*, 282 U. S. 531, 541 (1931). "To arbitrarily establish a fixed policy to govern every case," as the Regional Director for the Thirteenth Region did, "is the antithesis of 'discretion.' " *Application of Frazzita*, 147 N. Y. S. 2d 11, 16 (Sup. Ct. 1955). As the court correctly observed,

> "Any determination calling for exercise of 'discretion' requires an actual exercise of judgment, which necessitates consideration of facts and circumstances which are necessary to make a sound, fair and just determination." *Ibid.*

Since the Regional Director for the Thirteenth Region neither considered the facts and circumstances nor exercised any judgment based thereon, it necessarily follows that the Regional Director did *not* exercise any discretion in refusing to provide foreign language ballots. See *United States ex rel. Accardi* v. *Shaughnessy, supra* at 267-268. Accordingly, the Petitioner's *post hoc* attempt to rationalize the Regional Director's departure from official Board policy on the basis that it constituted a proper exercise of discretion must fail. [3]

5. The court below did not exceed the permissible scope of judicial review of administrative action. Contrary to Petitioner's assertion, the court below did not "substitute its own procedural rules for those adopted by the Board" (Petition, p. 7). It only held that the Board must follow its own established policies. In so ruling, the court was carry-

3. The attempt by both the Regional Director and the Board to rationalize the former's refusal to provide foreign language ballots must be viewed somewhat skeptically. Some two weeks *after* the Regional Director issued his Report on Objections, the Thirteenth Region succinctly stated the real reason why Objection No. 10 was overruled: "[A]ll of our ballots are printed in English and we have made no exception to this rule" (R. A. 11).

ing out its "responsibility for assuring that the Board keep within reasonable grounds," *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 490 (1951). *Cf., NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 90 S. Ct. 417, 422 (1969) ("... the courts of appeals, and not this Court, are the watchdogs of the Board") (dissenting opinion of Chief Justice Burger and Justices Douglas and Harlan). Since this case is not one of those "rare instance[s] when the standard appears to have been misapprehended or grossly misapplied," there is no need for this Court to intervene. *Universal Camera Corp.* v. *NLRB, supra* at 491.

6. The failure to provide the approximately 200 Spanish-speaking employees ballots which they could read and understand constitutes prejudicial error. Petitioner, however, relying on Section 10 of the Administrative Procedure Act, 5 U. S. C. § 706, and this Court's decision in *NLRB* v. *Mattison Machine Works*, 365 U. S. 123 (1961), asserts that the decision of the court below is in conflict with the principle "that administrative action is not to be overturned merely because of non-prejudicial error" (Petition, pp. 10-11). Petitioner is precluded, however, from raising this issue since it was not urged or argued by either Petitioner or the Board in the court below. Examination of the briefs submitted below and the court's decision thus show that there was no discussion or reference to either the provision of the Administrative Procedure Act concerning non-prejudicial error or this Court's decision in *Mattison*. To allow the issue to be raised for the first time in this Court without benefit of a decision by the court below would be contrary to not only sound judicial discretion but numerous prior decisions of this Court as well. See, *e.g., Helvering* v. *Tex-Penn Oil Co., supra. Cf., CIO* v. *McAdory*, 325 U. S. 472 (1945).

Assuming, however, that the issue can be raised, it is submitted that the failure to provide the approximately 200

Spanish-speaking employees ballots which they could read and understand, contrary to uniform Board policy, constitutes prejudicial eror. As the court below noted (A. 10):

> "An election in which one-third of the electorate has no access to ballots in language it can understand necessarily falls below the minimum laboratory standards of fairness. . . . We can think of few things more fundamental to a democratic selection of labor representatives than the ability of the polity to cast an intelligent vote."

In view of the Board's uniform policy[4] and the substantial number of employees who were denied foreign language ballots, the Regional Director's error in failing to provide foreign language ballots cannot be considered as a trivial irregularity of administrative procedure of the sort in-

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4. The importance Board members place on foreign language ballots shows that the failure to provide foreign language ballots is not a trivial irregularity. As Board member Sam Zagoria stated:

> ". . . we go to great lengths to bring the election to the workers and to help them understand the ballot, even preparing ballots in foreign languages where necessary. The most recent I have seen was in Arabic." Zagoria, "How Now, National Labor Relations Board?," Remarks to Labor Section of the State Bar of Georgia, Atlanta, Georgia, December 13, 1968.

Moreover, NLRB Associate General Counsel Stephen Gordon recently observed that:

> ". . . the agency has posted election notices and has distributed voting ballots not only in the most isolated areas of this country, but has translated notices of elections and ballots into almost every language of the world, ranging from Spanish, Italian, Polish, German, Yugoslavian, Yiddish, Russian, Chinese, Japanese to Tagalog." Remarks by H. Stephen Gordon, "Union Authorization Cards and the Duty to Bargain," 33 *BNA Daily Lab. Rep.*, D-1, D-11 (1968).

See *Katzenbach* v. *Morgan*, 384 U. S. 641, 654 n. 15 (1966), wherein the Court stated that numerous "States have found ways of assuring an intelligent exercise of the franchise short of total disenfranchisement of persons not literate in English," noting, *inter alia*, that in New Mexico "ballots and instructions [are] authorized to be printed in English or Spanish."

volved in *Mattison*. In *Mattison* the mistake involved reference on the notice of election and ballots to the employer as "Mattison Machine Manufacturing Company" rather than "Mattison Machine Works," the employer's correct name. *NLRB* v. *Mattison Machine Works*, 274 F. 2d 347, 348 (7th Cir. 1960). Surely, such a trivial error is far different in substance and kind than the failure of the Regional Director to provide foreign language ballots for the 200 employees who neither spoke nor understood English.

Moreover, the court below adequately disposed of Petitioner's contention that none of the employees could have been confused because there was an allegedly simple "yes-no" choice on the ballot, stating (A. 11):

> ". . . the voter's ability to recognize 'yes' and 'no' may not put an end to his problems. As Marriott points out, he must read the question and instructions on the ballot as well, and these may be more troublesome. These are possibilities that cannot be resolved by speculation. . . ."

Nor is there any requirement that the Employer prove that there was actual misunderstanding or confusion caused by the failure to provide foreign language ballots.[5] Petitioner's contention to the contrary ignores the well-established principle that the Board does *not* delve into the subjective state of mind of the electorate to determine whether an election should be set aside. Thus, in *Fibre Leather Manufacturing Corp.*, 167 NLRB No. 51, 66 LRRM 1056 (1967), the Board set aside an election where the Regional Director failed to provide bilingual ballots even though "no employee approached either of the bilingual observers

5. The record shows that there was confusion in that numerous prospective Spanish-speaking employees left the polling area without voting (R. 16). As the court below noted, "Voters may be embarrassed about their unfamiliarity with English and . . . stay away from the polls" (A. 11).

to ask a question or request assistance." 66 LRRM at 1057. The Board's holding in *Fibre Leather* was *not* based on any actual voter misunderstanding, but rather on its belief "that the conditions under which the election was conducted were [not] such as to assure the effective and informed expression by all employees of their true desire." *Ibid.* And in *Athbro Precision Engineering Corp.*, 166 NLRB No. 116, 65 LRRM 1699 (1967), the Board set aside an election even though "the Board Agent's conduct did not affect the votes of employees . . ." See Bok, "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act," 78 Harv. L. Rev. 38, 42 (1964) (". . . judges and administrators have agreed that actual interference with an election need not be shown to establish a violation of the law; it is enough that the conduct in question *tends* to have these effects").

Finally, the Board's decision in *Hollywood Ceramics Co.*, 140 NLRB 221 (1962), is instructive.[6] There the Board set an election aside because the Union, *inter alia*, failed to provide a Spanish translation for an explanatory sentence in one of its campaign bulletins. The Board reasoned that since one-third of the employees "were fluent in or could understand only Spanish" (precisely the same situation as in the case at bar), the lack of a Spanish translation in a campaign bulletin resulted in a situation where employees "were very likely to have been confused and misled." *Id.* at 226. Thus, the Board, in accord with its policy of *not* delving into the electorate's subjective state of mind, set aside the election because of probable confusion, not actual confusion. If the failure to translate campaign materials constitutes a basis or setting aside an election, *a fortiori*,

6. The Board's decision in *Hollywood Ceramics* was cited with approval in *Linn* v. *United Plant Guard Workers of America, Local 114*, 383 U. S. 53, 60 (1966).

the court below was correct in holding that the failure to provide Spanish ballots constitutes a basis for vitiating the election.

7. Certiorari should not be granted because the principle issue raised by the Petitioner is unimportant insofar as the overall administration of the Act is concerned and for all intents and purposes is moot. Within one month after the Employer brought to the Board's attention the fact that the Thirteenth Region *never* provided foreign language ballots, it fell into line and began providing foreign language ballots in representation elections (R. A. 1). If anything, this about-face establishes the arbitrariness of the Thirteenth Region's failure to follow the Board's uniform policy and "points up," as the Court of Appeals noted, "the isolated nature of the Region's former rule requiring English ballots" (A. 7).

CONCLUSION.

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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February 2, 1970.

NLRB-4135 (SP)
(12-59)

RA1

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ESTADOS UNIDOS DE AMERICA
JUNTA NACIONAL DE RELACIONES DEL TRABAJO

AVISO DE ELECCION

DERECHOS DE LOS EMPLEADOS

El Artículo 8(a)(3) de la Ley Nacional de Relaciones del Trabajo dispone, en parte, que nada en la Ley impedirá a un patrono el hacer un convenio con una organización obrera para requerir como condición de empleo el hacerse miembro de la misma en o después del trigésimo día siguiente al comienzo de dicho empleo o de la fecha de efectividad de dicho convenio, de dichas fechas la que fuere posterior, (i) si dicha organización es para la fecha en que dicho convenio es efectuado la representante de negociación colectiva de los empleados en la unidad apropiada cubierta por dicho convenio; y (ii) a menos que después de haberse celebrado una elección según se dispone en el Artículo 9(e) dentro de 1 año con anterioridad a la fecha de efectividad de dicho convenio, la Junta haya certificado que por lo menos una mayoría de los empleados elegibles para votar en dicha elección ha votado para rescindir la autoridad de dicha organización obrera para efectuar dicho convenio.

El Artículo 8(f) de la Ley Nacional de Relaciones del Trabajo dispone, en parte, que no será una práctica ilícita de trabajo el que un patrono dedicado principalmente a la industria de construcción haga con una organización obrera cuyos miembros son empleados de construcción un convenio cubriendo a empleados que trabajen (o quienes, al ser empleados, trabajarán) en la industria de construcción debido a que dicho convenio requiere como condición de empleo el ser miembro de dicha organización después del séptimo día siguiente al comienzo de dicho empleo o de la fecha de efectividad del convenio, de dichas fechas la que fuere posterior.

PROPOSITO DE LA ELECCION

Una elección por papeleta secreta se llevará a cabo bajo la supervisión del Director Regional de la Junta Nacional de Relaciones del Trabajo, entre los votantes elegibles aquí descritos, para determinar si dichos empleados desean retirar la autoridad que la Unión tiene, bajo su convenio con el Patrono, para requerir que el ser miembro de la Unión sea una condición de empleo.

PAPELETA SECRETA

La elección será por medio de papeleta SECRETA. A los votantes se les permitirá votar sin intervención, restricción o coerción. No se permitirá hacer campaña electoral en o cerca del sitio de votar. Las violaciones a estas reglas deberán ser informadas inmediatamente al Director Regional o a su agente a cargo de la elección. Se llama su atención hacia la sección 12 de la Ley Nacional de Relaciones del Trabajo:

> **CUALQUIER PERSONA QUE VOLUNTARIAMENTE RESISTA, EVITE, IMPIDA O INTERVENGA CON CUALQUIER MIEMBRO DE LA JUNTA O CUALQUIERA DE SUS AGENTES O AGENCIAS EN EL DESEMPEÑO DE SUS DEBERES EN EL CUMPLIMIENTO DE ESTA LEY, SERA CASTIGA CON UNA MULTA DE NO MAS DE $5,000 O PRISON QUE NO EXCEDERA DE UN AÑO, O AMBRAS PENAS.**

Un agente de la Junta entregará una papeleta a cada uno de los votantes elegibles en el sitio de votar. El votante entonces marcará la papeleta secretamente en una caseta de votar y la doblará. Entonces el votante personalmente depositará la papeleta doblada en una urna electoral bajo la supervisión de un agente de la Junta. La mayoría de los empleados elegibles que voten determinará los resultados de la elección.

Para su información únicamente se incorpora aquí una copia de la papeleta oficial.

OBSERVADORES AUTORIZADOS

Cada una de las partes interesadas puede nombrar igual número de observadores, cuyo número ha de ser determinado por el Director Regional o su agente a cargo de la elección. Estos observadores tendrán que: (a) actuar como verificadores en el sitio de votar y al contarse las papeletas, (b) ayudar en la identificación de los votantes, (c) recusar votantes y papeletas, y (d) en cualquier otra forma ayudar al Director Regional o a su agente.

REGLAS DE ELEGIBILIDAD

Los empleados descritos bajo UNIDAD DE VOTANTES en este Aviso de Elección que no trabajaron durante el período de nómina que se ha designado por haber estado enfermos o de vacaciones o suspendidos temporalmente, y los empleados que estén en las fuerzas armadas de los Estados Unidos que acudan personalmente a la elección serán elegibles para votar. Aquellos empleados que han dejado el trabajo o que hayan sido despedidos por causa a partir del período de nómina designado y aquellos empleados que participen en una huelga quienes hayan sido despedidos por causa desde que comenzó la misma, y quienes no han sido reempleados o reinstalados antes de la fecha de la elección, y aquellos empleados que participen en una huelga económica que comenzó más de 12 meses antes de la fecha de la elección y quienes han sido reemplazados permanentemente, no serán elegibles para votar.

RECUSACION DE VOTANTES

La recusación de un votante DEBE ser hecha antes del votante depositar su papeleta en la urna electoral.

INFORMACION CONCERNIENTE A LA ELECCION

Cualquier empleado que desee obtener información adicional concerniente a los términos y condiciones bajo los cuales se llevará a cabo esta elección, o que desee plantear cualquier cuestión concerniente a la celebración de una elección, la unidad de votantes, o reglas de elegibilidad, lo podrá hacer comunicándose con el Director Regional o su agente a cargo de la elección.

RESINOID ENGINEERING CORPORATION
Skokie, Illinois

13-RC-11089
REGULACION

UNIDAD DE VOTACION

Son elegibles para el voto todos los trabajadores y empleados de mantenimiento del centro de trabajo de esta firma situado en Skokie, Illinois, que estuvieron empleados en dicho centro durante el período de nómina que terminó el 26 de energo de 1,967, con excepcion de los oficinistas que trabajan en la oficina, los profesionales, virgilantes y supervisores tal como se les define en el Acta.

TIEMPO Y LUGAR DE LA ELECCION

FECHA: 28 de Febrero de 1,967 TIEMPO: De 3.00 P.M. a 6.00-P.M.

LUGAR: Extremo Norte del edificio adyacente a la plataforma de carga.

"Los empleados serán llamados al voto por un equipo de observadores autorizados de acuerdo con un programa establecido por la firma anexo a la presente como "Exhibit A". Todos los empleados que no puedan votar junto con sus grupos respectivos podrán votar en cualquier momento durante el periodo de votacion programado."

UNITED STATES OF AMERICA
ESTADOS UNIDOS DE AMERICA
National Labor Relations Board
Junta Nacional De Relaciones Del Trabajo
OFFICIAL SECRET BALLOT
PAPELETA SECRETA OFICIAL

For Certain Employees of
Pana Ciertos Empleados De

RESINOID ENGINEERING CORPORATION

Do you wish to be represented for purposes of collective bargaining by -
c Desea usted estar representado para los fines de negociar colectivamente por -

UNITED STEELWORKERS OF AMERICA, AFL-CIO

MARK AN "X" IN THE SQUARE OF YOUR CHOICE
MARQUESE CON UNA "X" DENTRO DEL CUADRO DE SU SELECCION

YES SI	NO NO
☐	☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
NO FIRME ESTA PAPELETA. Doblela y depositela en la urna electoral.

If you spoil this ballot return it to the Board Agent for a new one.
Si usted daha esta papeleta devuelvala al Agente de la Junta y pidale una nueva.

MUESTRA

ESTE ES EL UNICO AVISO OFICIAL DE ESTA ELECCION Y NO DEBE SER MUTILADO POR NADIE

GPO 889816

UNITED STATES OF AMERICA,

NATIONAL LABOR RELATIONS BOARD.

STIPULATION FOR CERTIFICATION UPON CONSENT ELECTION.

Pursuant to a Petition duly filed under Section 9 of the National Labor Relations Act, as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), the undersigned parties hereby Agree As Follows:

1. Secret Ballot.—An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board.

2. Eligible Voters.—The eligible voters shall be those employees included within the Unit described below, who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements, but *excluding* any employees who have since quit or been discharged for cause and employees engaged in a strike who have been dis-

charged for cause since the commencement thereof, and who have not been rehired or reinstated prior to the date of the election, and employees engaged in an economic strike which commenced more than twelve (12) months prior to the date of the election and who have been permanently replaced. At a date fixed by the Regional Director, the parties, as requested, will furnish to the Regional Director, an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. Notices of Election.—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The parties, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. Observers.—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer at the polling places during the election to assist in its conduct, to challenge the eligibilty of voters, and to verify the tally.

5. Tally of Ballots.—As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties.

6. Post-Election and Run-Off Procedure.—All procedure subsequent to the conclusion of counting ballots shall be in conformity with the Board's Rules and Regulations.

7. Record.—The record in this case shall be governed by the appropriate provisions of the Board's Rules and

Regulations and shall include this stipulation. Hearing and notice thereof, Direction of Election, and the making of Findings of Fact and Conclusions of Law by the Board prior to the election are hereby expressly waived.

8. Commerce.—The Employer is engaged in commerce within the meaning of Section 2(6) of the National Labor Relations Act, and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c). (*Insert 'commerce facts.*)

Marriott in-flite services division of Marriott-Hot Shoppes Inc., a Delaware corporation, is engaged in the operation of providing in-flite food service. During the preceding twelve months, it received in excess of $50,000 worth of materials directly from states other than the State of Illinois.

9. Wording on the Ballot.—Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No." In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot, or if the occasion demands, from top to bottom. (*If more than one union is to appear on the ballot, any union may have its name removed from the ballot by the approval of the Regional Director of a timely request, in writing, to that effect.*)

First.

Second.

Third.

10. Payroll Period for Eligibility.—February 11, 1966.

11. Date, Hours, and Place of Election.—March 18, 1966.

(1): Shoppe 392
9:00 AM to 11:30 AM
4:00 PM to 6:00 PM
8:00 PM to 9:00 PM
Procurement area near back dock

(2): Shoppe 391
7:00 AM to 8:30 AM
1:00 PM to 3:00 PM
7:00 PM to 8:00 PM
Cream Room

(3): Shoppe 395
7:00 AM to 8:30 AM
1:00 PM to 3:00 PM
7:00 PM to 8:00 PM
Dry food storage room, lower level

12. The Appropriate Collective Bargaining Unit.—All full time and regular part-time employees engaged in food, beverage, and equipment preparation, assembly, handling, receiving, storage and packing, including maintenance employees, food and equipment handlers, food and equipment helpers, dispatchers, coordinators and plant clerical employees employed at the Employer's Shoppes Nos. 392 and 395, O'Hare International Airport, Chicago, Illinois and the Employer's Shoppe No. 391 at 9864 Leland Avenue, Schiller Park, Illinois, but excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

If Notice of Representation Hearing has been issued in this case, the approval of this stipulation by the Regional

Director shall constitute withdrawal of the Notice of Representation Hearing heretofore issued.

Marriott-In-Flite Services Division of
Marriott-Hot Shoppes, Inc.

(Employer)

O'Hare Airport & Schiller Park, Ill.

(Address)

By /s/ H. H. Schaller, V. P. 2/21/66

(Name and Title) (Date)

Recommended:

/s/ James O. Miller 2/21/66

(Board Agent) (Date)

Date approved 2/24/66

/s/ William J. Cavers, Mhs.
Regional Director,
National Labor Relations Board.

Local 300, United Industrial Workers of America, Transportation Services and Allied Workers, Seafarers' International Union of North America, AFL-CIO

(Name of Organization)

Room 506, 605 W. Washington Blvd., Chicago, Illinois

(Address)

By /s/ Gregory Grana, Pres. 2-21-66

(Name and Title) (Date)

Case No. 13-RM-831

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

AFFIDAVIT.

J. Lyle Fackrell, having been duly sworn, states:

I am the Director of Employee Relations of Marriott-Hot Shoppes, Inc. I acted as a representative of the Company in the consent election conference held in the offices of the National Labor Relations Board, Region 13, Chicago, Illinois on February 21, 1966. The meeting was conducted by Mr. James A. Miller, NLRB Field Examiner. At this meeting the Company and Local 300, United Industrial Workers of America, Transportation Services and Allied Workers, Seafarers International Union of North America, AFL-CIO executed a stipulation for Certification upon Consent Election.

Present on behalf of the Union were Union Attorney, Mr. Irving M. Friedman, Katz & Friedman, Chicago, Illinois, various Union officials and some 30 or 40 employees of our Company in the voting unit. Present on behalf of the Company were our attorney, Mr. John T. Weise, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Illinois and various management officials including myself.

Our attorney, Mr. Weise, advised the NLRB representative, Mr. Miller, that a sizeable portion of the electorate speak and understand Spanish only. Mr. Weise then requested that the Board provide Spanish election notices and also Spanish ballots. The Union Attorney, Mr. Friedman, joined in this request.

NLRB representative Miller replied that the notices would be in Spanish, but he questioned whether Board policy permitted foreign language ballots. The matter was concluded with an understanding between the parties, and Mr. Miller, that the ballots would be in Spanish as well as

English, if Board policy permitted a foreign language ballot, and if Board policy did not so permit, the ballots would be in English only. The Company received no further comment on this matter from the NLRB.

The election notices were in Spanish and English. The ballots were in English only.

The foregoing is true and correct to the best of my knowledge.

J. LYLE FACKRELL.

Subscribed and sworn to before me this 12th day of January, 1967.

ELAINE J. PENK,
Nortary Public.

RA10

NATIONAL LABOR RELATIONS BOARD
Washington, D. C. 20570

December 14, 1966

R. Theodore Clark, Jr., Esquire
111 West Jackson Boulevard
Chicago, Illinois 60604

Dear Mr. Clark:

Confirming my telephone conversation with you as of today, please be advised that the Agency does have a uniform policy in handling such a problem. Policy may be stated as follows:

As the director deems it necessary, election notices printed in a foreign language may be posted and in such cases, the foreign language used on the notice should also appear on the ballot. Because many of our Regions have no recourse to such a procedure, it is understandable that some of them may have advised you that their policy is contrary to that stated above. I trust that this will be helpful to you in dealing with your clients and our Regional Offices.

Sincerely yours,

HOWARD W. KLEEB,
Associate Executive Secretary.

RA11

NATIONAL LABOR RELATIONS BOARD
Thirteenth Region

881 U. S. Courthouse and Federal Office Building
219 South Dearborn Street, Chicago, Illinois 60604
Telephone 828-7572

June 16, 1966

Seyfarth, Shaw, Fairweather & Geraldson
Attn: R. Theodore Clark, Esq.
111 West Jackson Boulevard
Chicago, Illinois 60604

Re: Thomas A. Nelson, d/b/a
Trio Metal Cap Company
Case N. 13-RC-10828

Gentlemen:

In your letter of June 14, 1966 you again requested that ballots be printed in Spanish and Polish in addition to English. As Mr. Boetticher stated in his letter of March 16, 1966, all of our ballots are printed in English and we have made no exception to this rule. Separate Polish and Spanish ballots would destroy the secrecy of the ballot for these groups of employees. Since all of these employees voted or had an opportunity to study the notices in the original election, there should be no confusion in the re-run election. No employees expressed difficulty in the original election and there has been sufficient time for employees to make inquiries to the Union, Employer, or co-workers if they have difficulty understanding the ballot. Since notices have been posted in English, Spanish and Polish, I think that this is more than adequate.

Very truly yours,

RODERICK C. MACLEOD,
Field Examiner,
Telephone: 828-7634.

RA12

NATIONAL LABOR RELATIONS BOARD

Subregion 38

4th Floor, Citizen's Building, 225 Main Street
Peoria, Illinois 61602

Telephone 673-9061

December 12, 1966

R. Theodore Clark, Jr., Esq.
Seyfarth, Shaw, Fairweather & Geraldson
111 West Jackson Boulevard
Chicago, Illinois 60604

Dear Mr. Clark:

This is in reply to your letter addressed to Mr. Allen which is dated December 10, 1966. Up to now, we have not been faced with any problems in connection with running elections in plants where the voters do not speak or understand English. If we should have such a situation, we would follow the practice in the Thirteenth Region which is under the direction of Mr. Ross M. Madden, as we are under his supervision in representation matters. I have been informed that in this region the Notices of Election are translated into other languages, but the ballots are always in English.

Very truly yours,

MICHAEL J. LUCERO,
Assistant to the Officer-in-Charge.

National Labor Relations Board Statements of Procedure, Series 8, as Amended 26 F. R. 3885.

* * * * *

SEC. 101.19. *Consent adjustments before formal hearing.*

* * * * *

(b) The consent-election agreement followed by a Board determination provides that disputed matters following the agreed upon election, if determinative of the results, shall be the basis of a formal decision by the Board instead of an informal determinatioin by the regional director, except that if the regional director decides that a hearing on objections or challenged ballots is necessary he may direct such a hearing before a hearing officer, or, if the case is consolidated with an unfair labor practice proceeding, before a trial examiner. If a hearing is directed, such action on the part of the regional director constitutes a transfer of the case to the Board. Thus, except for directing a hearing, it is provided that the Board, rather than the regional director, makes the final determination of questions raised concerning eligibility, challenged votes, and objections to the conduct of the election. Thus, if challenged ballots are sufficient in number to affect the results of the count, the regional director conducts an investigation and issues a report on the challenges instead of ruling thereon unless he elects to hold a hearing. Similarly, if objections to the conduct of the election are filed within 5 days after issuance of the tally of ballots, the regional director likewise conducts an investigation and issues a report instead of ruling on the validity of the objections, unless he elects to hold a hearing. The regional director's report is served on the parties, who may file exceptions thereto within 10 days with the Board in Washington, D. C. The Board then reviews the entire record made and may, if a substantial

issue is raised, direct a hearing on the challenged ballots or the objections to the conduct of the election. Or, the Board may, if no substantial issues are raised, affirm the regional director's report and take appropriate action in termination of the proceedings. If a hearing is ordered by the regional director or the Board on the challenged ballots or objections, all parties are heard and a report containing findings of fact and recommendations as to the disposition of the challenges or objections, or both, and resolving issues of credibility is issued by the hearing officer and served on the parties, who may file exceptions thereto within 10 days with the Board in Washington, D. C. The record made on the hearing is reviewed by the Board with the assistance of its legal assistants and a final determination made thereon. If the objections are found to have merit, the election results may be voided and a new election conducted under the supervision of the regional director. If the union has been selected as the representative, the Board or the regional director, as the case may be, issues its certification, and the proceeding is terminated. If upon a decertification or employer petition the union loses the election, the Board or the regional director, as the case may be, certifies that the union is not the chosen representative.

* * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1039

LOCAL 300, UNITED INDUSTRIAL WORKERS OF AMERICA, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO, PETITIONER

v.

MARRIOTT IN-FLITE SERVICES DIVISION OF MARRIOTT CORPORATION AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that the Company violated Section 8(a)(5) of the National Labor Relations Act by refusing to bargain with petitioner which, after a Board election, had been certified as the representative of the Company's flight kitchen employees at O'Hare Airport in Chicago. The Company challenged the certification because, *inter alia,* Spanish language ballots had not been provided. At a pre-election conference, both the Union and the Company had asked that

375-544—70

the Board's Regional Director provide Spanish language ballots since about one-third of the electorate was Spanish speaking. The Director subsequently distributed and posted notices of election in Spanish as well as in English, with the sample ballot on each notice written in English; at the election only English language ballots were available. The Union won the election. The Board overruled the Company's contention that the lack of Spanish language ballots tainted the election results, noting that Spanish speaking observers were present at the election and neither they nor any employee had indicated that there was any misunderstanding respecting the ballot, which merely required a simple "yes" or "no" vote. Moreover, the English language ballot was explained by the election notices, which were written in both Spanish and English. (Pet. App. A19–A20, n. 4.)

2. The court below refused to enforce the Board's order on the ground that "[a]n election in which one-third of the electorate has no access to ballots in language that it can understand necessarily falls below the minimum laboratory standards of fairness" (Pet. App. A10). The court noted that evidence introduced in the representation proceeding indicated that at least 18 other Board regional offices follow a policy of making foreign language ballots available when a substantial language problem is presented, and that the Board's Associate Executive Secretary had stated, in response to a Company inquiry, that this was the Board's general policy (Pet. App. A4–A6).

3. The Board agrees with petitioner that the court below, in overturning the Board's determination that the lack of foreign language ballots did not warrant a setting aside of the election here, failed to give due weight to the principle that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives * * *" (*National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330). However, as the court below noted, the Board's general policy is to provide foreign language ballots in similar circumstances. Moreover, the region involved here has subsequently used foreign language ballots in such situations (J.A. 170, 172).[1] In these circumstances, the Board does not believe that the present case presents an issue of sufficient importance in the administration of the Act to warrant further review.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel.

FEBRUARY 1970.

[1] "J.A." refers to the joint appendix filed in the court below.

U.S. GOVERNMENT PRINTING OFFICE: 1970